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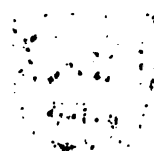
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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO JULY 16, 1907.

VOL. CXXVIII
A. D. 1907.

LAST FILING DATES OF REPORTED CASES:

FIRST DISTRICT, OCTOBER 9, 1906;
SECOND DISTRICT, OCTOBER 16, 1906;
FOURTH DISTRICT, SEPTEMBER 14, 1906.

EDITED BY

W. CLYDE JONES AND KEENE H. ADDINGTON,

AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JULY 16, 1907.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....East St. Louis.
Second District—WILLIAM M. FARMER.....Vandalia.
Third District—FRANK K. DUNN.....Charleston.
Fourth District—GUY C. SCOTT.....Aledo.
Fifth District—JOHN P. HAND.....Cambridge.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Hand is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, of the law firm of Jones, Addington & Ames, 100 Washington street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

EDWARD O. BROWN, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

JESSE HOLDOM, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

FRANK BAKER, Presiding Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT—

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

HENRY B. WILLIS, Presiding Justice, Elgin.

DORRANCE DIBELL, Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

JAMES S. BAUME, Presiding Justice, Galena.

FRANK D. RAMSAY, Justice, Morrison.

LESLIE D. PUTERBAUGH, Justice, Peoria.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millsbaugh, Mount Vernon.

JAMES A. CREIGHTON, Presiding Justice, Springfield.

COLOSTIN D. MYERS, Justice, Bloomington.

HARRY HIGBEE, Justice, Pittsfield.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows: *

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

PRINCE A. PEARCE, Carmi.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.

ROBERT D. W. HOLDER, Belleville.

CHARLES T. MOORE, Nashville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

ALBERT M. ROSE, Louisville.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

JAMES W. CRAIG, Mattoon.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

OLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.

* Laws 1897, 188.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield,
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.
ROBERT J. GRIER, Monmouth.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ALBERT O. MARSHALL, Joliet.
FRANK L. HOOPER, Watseka.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

SAMUEL C. STOUGH, Morris.
RICHARD M. SKINNER, Princeton.
EDGAR ELDREDGE, Ottawa.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.
JAMES S. BAUME, Galena.
OSCAR E. HEARD, Freeport.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
LINUS C. RUTH, Hinsdale.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
ROBERT W. WRIGHT, Belvidere.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—Joseph E. Bidwill, Jr., Fort Dearborn Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,
RICHARD S. TUTHILL,
RICHARD W. CLIFFORD,
FRANK BAKER,
FRANCIS ADAMS,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
EDWARD O. BROWN,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JULIAN W. MACK,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—Charles W. Vail, Fort Dearborn Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY
BEN M. SMITH,
THEODORE BRENTANO,
GEORGE A. DUPUY,
ALBERT C. BARNES,
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,
FARLIN Q. BALL,
AXEL CHYTRAUS,
JESSE HOLDOM,
MARCUS KAVANAGH,
WILLARD M. MCEWEN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 87, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. FRANK W. GREENAWAY, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

EDWARD M. MANGAN, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL McWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

THE CITY COURT OF MATTOON.

HORACE S. CLARK, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. JOSEPH R. BABCOCK, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. MCCBORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BIZAILLON.....	Calhoun.....	Hardin.
JOHN D. TURNBAUGH.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
THOMAS J. ROTH.....	Champaign.....	Urbana.
JAMES H. MORGAN.....	Christian.....	Taylorville.
HERSHEL R. SNAVELY.....	Clark.....	Marshall.
ALSIE N. TOLLIVER.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
LEWIS RINAKER.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J..	Cook.....	Chicago.
JOHN C. MAXWELL.....	Crawford.....	Robinson.
A. L. RUFFNER.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
W. J. DOLSON.....	Douglas.....	Tuscola.
MAZZINI SLUSKER.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
MICHAEL O'DONNELL.....	Effingham.....	Effingham.
JOHN H. WEBB.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
T. J. MYERS.....	Franklin.....	Benton.
JOHN D. BRECKENRIDGE.....	Fulton.....	Lewistown.
W. S. PHILLIPS.....	Gallatin.....	Shawneetown.
THOMAS HANSHAW.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
JOHN M. ECKLEY.....	Hamilton.....	McLeansboro.
CHARLES A. JAMES.....	Hancock.....	Carthage.
JOHN H. FERRELL.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
ALBERT E. BERGLAND.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Wateeka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
PAUL WILLIAMS.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
THOMAS F. FERNS.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
THOMAS H. SHERIDAN.....	Johnson.....	Vienna.
FRANK G. PLAIN.....	Kane.....	Geneva.
DAVID B. SHERWOOD, Pro. J..	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle.....	Ottawa.
ALBERT T. LARDIN, Pro. J.....	LaSalle.....	Ottawa.
JASPER A. BENSON.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
ULYSSES W. LOUDERBACK.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
JOHN S. STONECIPHER.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
HENRY E. BURGESS.....	Mercer.....	Aledo.
LOUIS ARNS.....	Monroe.....	Waterloo.
JOHN L. DRYER.....	Montgomery.....	Hillsboro.
FRANCIS E. BALDWIN.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
LEANDER O. EAGLETON, Pro. J.....	Peoria.....	Peoria.
MARION C. COOK.....	Perry.....	Pinckneyville.
ELIM J. HAWBAKER.....	Piatt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
LYMAN G. CASTER.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ROBT. W. OLMSTED.....	Rock Island.....	Rock Island.
ALBERT E. SOMERS.....	Saline.....	Harrisburg.
G. W. MURRAY.....	Sangamon.....	Springfield.
CLARENCE A. JONES, Pro. J.....	Sangamon.....	Springfield.
WM. H. DIETERICH.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
CALVIN GREEN.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
ISAAC A. LOVE.....	Vermillion.....	Danville.
JOHN A. LOPP.....	Wabash.....	Mt. Carmel.
J. W. CLENDENIN.....	Warren.....	Monmouth.
LEWIS BERNREUTTER.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
THOMAS G. PARKER.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
JOHN F. BOSWORTH.....	Woodford.....	Eureka.

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CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1906.

L. Starks v. M. Schlensky.

Gen. No. 4,615.

1. **VERDICT**—*when not disturbed as against the evidence.* An Appellate Court must give great weight to the finding of the jury and will not disturb it unless it is not sustained by the evidence or unless it is clearly against the weight of the evidence.

2. **ERRORS**—*when will not reverse.* Errors which are favorable to the complaining party are not ground for reversal.

3. **WITNESS**—*neither race nor religion competent to affect credibility.* It is not competent to inquire of a witness with respect to his race or religion for the purpose of affecting his credibility as a witness.

4. **DELIVERY**—*when purchaser justified in refusing to accept.* When the article bargained for is at the time of its delivery not in the condition contemplated in view of the contract or as expressly or impliedly warranted, the purchaser may refuse to accept the same and rescind the contract.

Action of assumpsit. Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed July 17, 1906.

HIGGINS & WALTER and A. J. VINSON, for appellant.

LAGGER & BLATT, for appellee.

MR. JUSTICE THOMPSON delivered the opinion of the court.

On December 1, 1902, the parties to this suit entered into a written contract by which appellant, a resident of Chicago, sold to appellee, a resident of Joliet, a car-load of potatoes to consist of 250 bushels of Triumph potatoes at seventy-one cents per bushel, and 250 bushels of Ohio potatoes at fifty-five cents per bushel, to be shipped from appellant's warehouse in Plainfield, Wisconsin, not later than May 1, 1903. Appellee paid \$50 in cash and agreed to pay the balance upon presentation of the bill of lading accompanied by sight draft. The contract provided that appellant should be responsible to appellee for all frozen or decayed potatoes at the date of arrival at their destination, and that appellant would refund to appellee the purchase price per bushel of all frozen or decayed potatoes. On March 6, appellee sent his written order for the shipment of the car of potatoes. The potatoes were shipped and arrived at Joliet March 8. Appellee examined the potatoes and claims they were afflicted with dry rot to such an extent that the whole shipment was unmerchantable, and that there were frozen and mixed varieties in the same sacks. Appellee refused to receive the shipment and notified appellant who sent an agent to Joliet to try and adjust matters, or to resell the same at Joliet. They were resold by appellant to a purchaser at Van Wert, Ohio, at a reduced price, potatoes having materially declined since the date of contract.

Appellant brought suit in a justice court in Will county to recover his damages and appellee filed a set-off, seeking to recover the \$50 he had paid on the contract. Appellant recovered judgment before the justice, and on appeal to the Circuit Court appellee recovered judgment for \$17.50 against appellant.

The evidence as to the quality of the potatoes is very conflicting and cannot be reconciled. Four witnesses

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for appellant, while admitting that there were potatoes in all the sacks they examined affected with dry rot and a few frost-bitten, testify they were in good merchantable condition. Upon the other hand three witnesses for appellee testify they were so affected with dry rot and frost that they were unmerchantable, and some of the witnesses add, that a few potatoes in a sack affected with dry rot will soon affect the others, and while they may look good upon the outside they will be found bad within. Two witnesses also testified that different varieties were mixed in some of the sacks. The jury believed the defendant's witnesses, and we cannot say the verdict is so manifestly against the evidence as to justify interfering with it. An Appellate Court must give great weight to the finding of the jury, and must not disturb it unless it is not sustained by the evidence, or unless it is clearly against the weight of the evidence. *Bradley v. Palmer*, 193 Ill. 90; *Masonic Assn. v. Collins*, 110 App. 504.

Appellant claimed he was entitled to recover of appellee \$70 after giving credit for the \$50 advanced at the time of making the contract. If the potatoes had been merchantable so that appellee was bound to receive them, he should have recovered a verdict for the full amount of his claim. If the potatoes were such by reason of rot, frost or mixture that appellee had the right to rescind the contract, then he was entitled to recover his \$50. The verdict is evidently a compromise in finding for appellee \$17.50, when, finding for him, it should have been \$50. A party cannot assign for error that which does him no injury. Appellant is not entitled to a reversal of the judgment, because it is more favorable to him than the case made by appellee in the trial court justifies. *Heyman v. Heyman*, 210 Ill. 524; *Reid v. Houston*, 20 App. 48; *Casey v. Vandever*, 76 App. 628; *Wolf v. Goodhue Ins. Co.*, 43 Barb. 400.

Appellee was asked upon his cross-examination:

"Are you of Jewish faith?" to which an objection was sustained. The appellant insists this was error. We understand the rule to be that "particular traits of character aside from lack of truth and veracity cannot be made the subject of inquiry for the purpose of impeaching a witness, when evidence of such traits is not material to the issue." 30 Am. & Eng. Ency. of Law, 1082. "Inquiry into religious belief is inadmissible to affect credibility;" the same authority, page 1096, and cases there cited. The Constitution of Illinois provides that "No person shall be denied any civil or political rights, privilege or capacity on account of his religious opinions," etc. The question was incompetent as violating his constitutional rights, immaterial as affecting his credibility and could have no other effect than to raise a prejudice against him because of his race. The court properly sustained the objection.

Appellant assigns as error the modification of the eighth instruction. The instruction as offered was: "The jury are instructed that the presence of frozen or decayed potatoes in the car in controversy in this case would not vitiate or affect the contract between the parties, except that the defendant would not be liable to pay for the potatoes so frozen or decayed." The court added "unless the same were frozen or decayed to such extent that the car load as a whole was not merchantable, in which case defendant would not be bound to accept the shipment." When the article bargained for is at the time of its delivery not in the condition contemplated in view of the contract or as expressly or impliedly warranted, the purchaser may refuse to accept the same and rescind the contract. *Doane v. Dunham*, 65 Ill. 512; *Foos v. Sabin*, 84 Ill. 564; *Hansen v. U. S. Brewing Co.* 70 Ill. App. 265. The modification was correct.

Appellant insists there was error in giving some of appellee's instructions. What has been said of the

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modification of appellant's instruction applies to this assignment. The contract being made in Chicago for potatoes to be shipped from Plainfield, Wisconsin, and delivered at Joliet, the purchaser had the right to inspect them and reject them before accepting them, if they were not such as would fill the contract.

We do not find any error in the case and it will be affirmed.

Affirmed.

Mr. Presiding Justice DIBELL, having tried this case below, took no part in its consideration here.

William Hill v. Jesse F. Viele et al.

Gen. No. 4,520.

1. **FREEHOLD**—*when not involved*. A freehold is not involved in a bill to redeem from a deed absolute in form, but in fact a mortgage.

2. **CONSTRUCTIVE MORTGAGE**—*what essential to establish claim of*. In order to establish a claim that a deed absolute in form is in fact a mortgage, a mere preponderance of evidence is not sufficient. The evidence must be clear, sufficient and convincing that such conveyance was intended to be a mortgage.

Bill to construe deed as mortgage. Appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed July 17, 1906.

EDWARD C. FITCH and L. H. BENNETT, for appellant;
JOEL C. FITCH, of counsel.

D. L. SMILEY and L. D. LOWELL, for appellees.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is a bill filed February 18, 1902, in the Circuit Court of Lake county by appellant, William Hill,

against Jesse F. Viele, Charles Jahnke and Charlotte Strobach, appellees, praying that a conveyance from Hill to Mrs. Strobach, in form a warranty deed, of a lot in the village of Barrington, be decreed to be a mortgage; that appellant be permitted to redeem therefrom, and to enjoin Viele from prosecuting a suit in forcible detainer against appellant.

The bill alleges that the premises described in said deed were at the time of the making of the deed, and up to the filing of the bill, occupied by appellant as his homestead, that the conveyance was made to secure \$300 before that time loaned by Mrs. Strobach to Hill, and such other sums as might be loaned by the grantee to the grantor not exceeding \$700, including the \$300; that Mrs. Strobach, subsequent to the delivery and recording of the said conveyance, executed and delivered to appellant an instrument in writing, in which she declared said deed was given only as a security for money loaned, and that the said instrument is in the possession of one Butterworth, attorney for appellant in a former forcible detainer suit prosecuted by Jahnke against Hill, and that appellant is unable to set forth said instrument with any more particularity.

The bill alleges also that before said deed was filed for record, an execution from the Circuit Court of Cook county was levied on the premises described in the deed, and said premises were sold to Charles Jahnke on said levy on the 8th of January, 1896, but without setting off the homestead of appellant; that Mrs. Strobach on March 5, 1901, conveyed said premises wrongfully by warranty deed to appellee, Jesse F. Viele, to defraud appellant while negotiations were pending between appellant and Mrs. Strobach to liquidate and settle their accounts, and that Viele had knowledge of the equities of appellant; that Viele has commenced proceedings in forcible detainer to oust appellant from the premises described in the deed. Defendants Viele and Jahnke answered deny-

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ing that the deed was executed as a mortgage, and that any such paper as a defeasance was ever in appellant's or his attorney's possession, or ever executed by Mrs. Strobach, and allege that Mrs. Strobach was the owner in fee simple, and that Viele bought without notice of any equity of appellant. Mrs. Strobach was defaulted; replications to the answers filed and the evidence heard in open court.

After the evidence was partly heard the bill was amended by interlineation striking out the date of the deed, "December 3, 1895," as alleged in the sworn bill, and inserting "April 4, 1896," as the date, and also changing the allegation as to the time of recording from "December 5, 1895," to "April 6, 1896." The answers were also amended so as to deny the amended allegations.

The Circuit Court found that on December 3, 1895, a deed was made from appellant to Charlotte Strobach, and on the same day appellant executed a note dated December 2, 1895, for \$500 to Mrs. Strobach, the grantee named in the deed, and that Mrs. Strobach executed a condition of defeasance back to appellant, and that the deed, note and defeasance were all executed and delivered the same day, December 3, 1895, and that said deed was recorded December 5, 1895. The court further found that afterwards, on April 6, 1896, appellant executed and delivered to Mrs. Strobach a second deed for the same premises without any condition or reservation whatever, and that this deed was recorded April 6, 1896, and that on March 5, 1901, Mrs. Strobach, now Mrs. Meier, conveyed said premises to Jesse F. Viele, and that he is the owner of the same, and dismissed the bill.

Appellees have entered a motion to dismiss the appeal upon the ground that a freehold is involved, and that therefore this court is without jurisdiction. A freehold is not involved in a bill to redeem from a deed absolute in form, but, in fact, a mortgage. Lynch v.

Jackson, 123 Ill. 360; Kirchoff v. Union Mutual Life Ins. Co., 128 Ill. 199. A freehold is not involved on appeal from a decree granting complainant's prayer to have a deed absolute in form declared to be a mortgage and to permit redemption, even though, as an incident to the redemption, a deed to a third person who had notice that the deed purporting to vest title in the grantor was intended as a mortgage, is set aside. Eddleman v. Fasig, 218 Ill. 340; Adamski v. Wieczorek, 181 Ill. 361.

The question of whether the deed from appellant to Mrs. Strobach was a deed or mortgage is the controverted question in this case and does not involve a freehold. Kirchoff v. Union Mutual Life Ins. Co., 128 Ill. 199. Should the said deed be found to be a mortgage, then the question whether Viele had any notice of such fact before the delivery of the deed from Mrs. Strobach to him becomes a material issue that must be passed upon. If the deed from appellant to Mrs. Strobach was, in fact, only a mortgage, and Viele took a deed with notice of such fact, then Viele is only an assignee of the mortgage of Mrs. Strobach and a freehold is not involved. Eddleman v. Fasig, 218 Ill. 340. If the conveyance to Mrs. Strobach be found not to be a mortgage, or if it be found to be a mortgage, and that Viele had notice of that fact before the conveyance to him, in either case the motion to dismiss must be overruled.

The testimony of appellant shows that in 1895 his relations with Mrs. Strobach were particularly friendly; that appellant's wife had obtained a divorce from him, and the execution under which his property was sold in January, 1896, was based upon a decree for alimony; that Mrs. Strobach had loaned money to appellant and was assisting him in his litigation by advancing money for him to pay his attorneys in the divorce matter, and also in the forcible detainer suit afterwards begun by Jahnke, disposed of in favor of

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appellant in the Circuit Court in March, 1898. He also testified that his family consisted of himself and one boy, and that he had in 1895 left his house and lived with Mrs. Strobach at her house in Cuba through the winter of 1895; that she first lived with appellant in his house from March, 1896, to March, 1897; that from May until the week before Christmas, 1900, she had lived on the premises while appellant was east, and that she had lived with, and kept house for him a year before that time.

The testimony of Hill shows that at the time of the execution of the deed dated December 3, 1895, a written defeasance was executed by Mrs. Strobach to appellant, and that on the same day he executed a note for \$500 dated December 2, 1895, to Mrs. Strobach. Mr. Butterworth, attorney for Hill in his forcible entry suit with Jahnke, testified that Hill produced the defeasance at that trial and offered it in evidence, and he thinks Jahnke was there, so that Jahnke had notice of it, and that the defeasance is lost. Butterworth also testified as to the contents of the defeasance that it showed the deed to be a security for money loaned.

The only testimony as to what deed the defeasance applied to is that of appellant Hill, with the exception of Butterworth testifying that Mrs. Strobach told him she wanted Hill to win the forcible detainer suit to protect her, as she was anxious about the money, as her deed was to secure her for money advanced. Mrs. Strobach might well be anxious for Hill to win in the Jahnke suit. The forcible detainer suit begun by Jahnke was based upon a deed issued upon the execution for alimony levied on the property November 25, 1895, before the first deed was made to Mrs. Strobach. The value of the lot did not exceed \$1,000 and was occupied as a homestead by Hill. This execution sale was made without setting off the homestead. If Hill should lose in the Jahnke suit, it would mean that

Mrs. Strobach's interest, whether a deed or mortgage, would be wiped out by the Jahnke deed and Mrs. Strobach would lose any claim she had, whether the same was a deed or mortgage, and what she had paid for the deed would be a total loss to her, and hence little, if any, weight can be given to the language claimed to have been used by her to Hill's attorney, Butterworth; certainly it is not sufficient to change a deed to a mortgage. Hill testifies the deed, note and defeasance were all executed at the same time. He identifies the note, and it bears date December 2, 1895. The first deed is dated December 3, 1895, and was recorded December 5, 1895, and if the defeasance was executed, then it applied only to that deed. There is not a word of evidence from Hill explaining how or why the second deed, dated April 6, 1906, which included an additional lot, came to be executed. Appellant Hill does not pretend to give any of the surrounding circumstances. The testimony would all seem to apply to the deed of December 3, 1895. Inference is sought to be drawn from the payment of taxes. Appellant was bound to pay the taxes up to and including those of 1895. He did not pay the taxes for the years 1896 to 1899. He paid them for 1900 and no others until after this bill was filed. We think, considering the relations of the parties, no inference can be drawn from such payments. The court will not presume that because the deed of December 3 was a mortgage, that the deed of April 6, following, was of the same character. The law will presume in the absence of proof to the contrary that a deed is what it purports to be—an absolute conveyance. A party who claims a deed absolute on its face to be a mortgage must sustain his claim by proof. A mere preponderance is not sufficient; the evidence must be clear, satisfactory and convincing that such conveyance was intended to be a mortgage. *Burgett v. Osborne*, 172 Ill. 227; *Williams v. Williams*, 180 id. 361; *Heaton v. Gaines*, 198 id. 479.

C. & J. Electric Ry. Co. v. Barrows.

There is no evidence that would justify holding the deed of April 6th was anything other than it purported to be—a deed absolute. The motion to dismiss is overruled and the decree of the Circuit Court affirmed.

Affirmed.

Chicago & Joliet Electric Railway Company v. Joseph Barrows.

Gen. No. 4,674.

1. **NEGLIGENCE PER SE**—*failure to look and listen not.* A failure to look and listen when approaching a railroad crossing is not negligence as a matter of law.

2. **TRACTION COMPANY**—*duty of, to avoid injuring person lawfully using streets.* A traction company is charged with knowledge that the public may lawfully use the entire street upon which its tracks are located and it must, in operating its cars upon such streets, use all reasonable means to avoid injuring those whom it knows may so lawfully use that part of the streets occupied by its tracks.

3. **COLLISION**—*duty of motorman to endeavor to avoid.* It is the duty of a motorman to exercise ordinary care to ascertain if the track ahead is clear, and he is bound to notice what vehicles ahead of his car and near the track are doing, and if he sees one going upon the track or so near it as to be in danger of being struck by the car, to warn the driver of such vehicle and, so far as he is able for the purpose of preventing a collision, to arrest the progress of the car.

4. **VERDICT**—*when not disturbed as against evidence.* When there is a conflict in the testimony, and the evidence of the successful party, when considered by itself, is sufficient to sustain the verdict, an appellate tribunal will not set aside the same, unless it is manifestly against the weight of the evidence.

5. **VERDICT**—*when not excessive.* A verdict of \$3,000 is not excessive where it appears that the plaintiff, of the age of seventy-nine years, lost by reason of the accident both of his feet, was confined to the hospital for four months, and where, in addition to the pain suffered, other consequences of a permanent nature resulted.

6. **ARGUMENT OF COUNSEL**—*when will not reverse.* Remarks made by counsel in argument are not ground for reversal, unless they are of such a character as to arouse and inflame the passions of the jury or be clearly injurious to the rights of the party complainant.

Action on the case for personal injuries. Appeal from the Circuit Court of Will county; the Hon. ALBERT O. MARSHALL, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed July 17, 1906.

E. MEERS, for appellant.

E. G. PURKHISER, for appellee.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is a suit brought by appellee Barrows, against appellant, to recover damages resulting from a collision in which an electric car of appellant on October 27, 1903, ran against a horse and wagon driven by appellee, a man of the age of seventy-nine years, on Jefferson street, in the city of Joliet, throwing him out of the wagon and cutting off both his feet. There are two counts in the declaration relied upon: the first alleges that appellant carelessly, negligently and wrongfully propelled its car, etc.; the second alleges that appellant negligently, without ringing a bell or gong or giving any other warning, ran against the wagon, etc. At the first trial the jury found for the defendant, and a new trial being granted, at the second trial the jury found a verdict of \$4,000 in favor of appellee; a *remittitur* being entered of \$1,000, judgment was entered for \$3,000.

Appellant argues strenuously that the verdict is not supported by the evidence and that it is excessive. The proof shows that Jefferson street runs east and west and is intersected by Eastern avenue running nearly north and south. Appellant's street car track coming from the west on Jefferson street is a single track up to a point about 150 feet west of Eastern avenue where a switch begins leading into a double track 100 feet west of Eastern avenue, the two tracks continuing to Eastern avenue and then curving around and running south on Eastern avenue. The method

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of operation as described by appellant in its brief is: "Cars going west, as they come from the south on Eastern avenue, run around the curve and stop on the Jefferson street end of the switch, to meet car going east, while cars going east on Jefferson street run around and stop on the Eastern avenue end of the switch to meet the car going west." Appellee kept his horse in a barn which was reached either through an alley leading south from Jefferson street about 160 feet west of the point on the Jefferson street end of the switch, or from Michigan street. Appellee at the time of the injury was seventy-nine years of age, with good hearing and eyesight, quite active for a man of his age, and lived with Mrs. Johnson on Jefferson street about 100 feet west from the said alley. Upon the day of the injury early in the afternoon, appellee testifies he drove west on the north side of Jefferson street, crossed Eastern avenue and passed a car standing at the west end of the switch; when he got near the place where he turns into the alley towards the barn he looked back to see if the car was coming and saw it still standing on the switch, then looked west to see if the car was coming from that direction, as he "expected one every minute," then he turned the horse to go across about 125 feet west from the end of the switch when he was struck and knocked unconscious; that no bell was rung, gong sounded or any warning given. A witness, Reid, who was sitting in a buggy about twelve feet from the alley, testifies he saw Barrows turn across the street car track about 100 to 115 feet west of the car, just as it was at the point of the switch, the car "did not ring bell or blow whistle;" the car pushed the horse and wagon sixty feet. A witness, Corcoran, foreman of the Alton yards in Joliet, testifies that appellee turned across the track when the car was 150 feet away. This witness was about 500 feet distant. Mr. Nichols, Mrs. Voigt and Mrs. Henry, passengers on the car, testified no bell or

gong was sounded from leaving the switch while going west on Jefferson street until the wagon was struck. Upon the other hand three witnesses, Gleason, the motorman, Found, a depot policeman in Chicago, and Mrs. Williams, who was in the third story of a residence across from the alley, each testifies that the car was within ten or twelve feet of the wagon when it turned to go across the street. Mr. Hunt, riding on a bicycle, saw the horse turn and the car strike the wagon, but does not say when the horse began to turn in, but heard no gong, and that Barrows was at the street car track when he first saw him. The conductor testified the gong was sounded; other witnesses did not see anything until the accident happened.

The proof further discloses that the car was running down grade; the grade from Eastern avenue to the switch being seventeen and one-half inches fall in 100 feet, and from the switch to the alley seven inches fall to the 100 feet. The testimony is contradictory as to whether the car from the west passed the west-bound car on the switch.

The theory of appellant is that the injury was occasioned by the want of ordinary care of appellee in crossing the street car track. The evidence favorable to appellant's contention is that of the witnesses who testify appellee was going along parallel with the track, and turned across when the car was within ten or twelve feet of him; while the evidence of an equal number of witnesses is that he turned across the track with the car 110 to 150 feet distant, with the testimony of appellee that he looked back just before starting across and the car was then standing still. Whether a bell or gong was sounded, a much greater number of witnesses testified that no warning of any kind was given.

The courts of Illinois have denied the contention that the failure to look and listen when approaching a railroad crossing is as a matter of law negligence, and

C. & J. Electric Ry. Co. v. Barrows.

have in recent years uniformly held that whether such failure was negligence or not was a question of fact, to be determined from all the facts and circumstances in the case. *Chicago City Ry. Co. v. O'Donnell*, 208 Ill. 267. The grant of the right to a street car company to use the street for rapid transportation of passengers, while it confers the right of passage along its track superior to vehicles, such companies do not have an exclusive right to the use of that part of the streets occupied by their tracks. The citizen must use ordinary care for his own safety and not obstruct the passage of the cars, and must leave the track whenever his presence there would impede the cars. At the same time the street car company is charged with the knowledge that the public may lawfully use the entire street and it must, in operating its cars on the streets, use all reasonable means to avoid injuring those whom it knows may rightfully use that part of the streets occupied by their tracks. *North Chicago Elec. Ry. Co. v. Peuser*, 190 Ill. 67; *North Chicago Street Railway Co. v. Smadraff*, 189 Ill. 155. It is the duty of the motorman to exercise ordinary care to ascertain if the track ahead is clear, and he is bound to notice what vehicles ahead of his car and near the track are doing, and if he sees one going upon the track or so near it as to be in danger of being struck by the car, to warn the driver of such vehicle and, so far as he is able for the purpose of preventing a collision, to arrest the progress of the car. *South Chicago City Railway Co. v. Kinnare, Admr.*, 96 Ill. App. 215. It is a question of fact for the jury whether or not the bell or gong should have been sounded and whether or not it was negligence for a traveler to attempt to cross the track at a regular place. *Chicago U. Tr. Co. v. Jacobson*, 217 Ill. 404; *C. & P. St. Ry. Co. v. Meixner*, 160 Ill. 320; *Canfield v. North Chicago Street Ry. Co.* 98 Ill. App. 5.

When there is a conflict in the testimony and the evi-

dence of the successful party when considered by itself is sufficient to sustain the verdict, an appellate tribunal will not disturb the finding, unless it is manifestly against the weight of the evidence. *Shevalier v. Seager*, 121 Ill. 564; *St. Louis, Jacksonville & C. Ry. Co. v. Terhune*, 50 Ill. 151; *Netcher v. Bernstein*, 110 Ill. App. 485; *Demmer v. Ins. Co.*, 110 Ill. App. 580.

Viewing the record in the light of the foregoing principles, there being ample evidence to sustain the verdict, the burden is upon appellant to show that the judgment is manifestly against the weight of the evidence. We think the judgment of the trial judge who heard the evidence and approved the verdict of the jury, with the exception of causing a *remittitur*, should be sustained.

It may here be noted that appellant made no motion in the trial court to take the case from the jury.

Upon the question of the amount of judgment, when the nature of the injury, the loss of both feet, the fact that appellee was in the hospital four months, that the bones of the leg project through the skin and the pain and suffering necessarily caused by the nature of the injury that has and will be endured the remainder of his life, even though it be short, are considered, in view of his age the sum of \$3,000 would seem not to be excessive.

It is urged that the third and fourth instructions given on behalf of appellee are misleading. These instructions are copied verbatim from *I. C. R. R. Co. v. Cole*, 165 Ill. 334, where they were approved in a personal injury suit.

In the argument of the case before the jury, counsel for appellee said: "These employees do not come in here and tell you the truth; they dare not tell the truth to the street car company; their very jobs depend on denying that they are negligent." Objections being made, the court said: "Yes, you are right; I hope attorneys will keep within bounds." At an-

other time counsel for appellee said: "Mr. Meers comes in here with a defense that they always have when a rig is struck by a street car, and that is that the driver pulled in front of the car." This being objected to, the court said the objector was right. At another time when objection was made the court stated: "The jury will ignore all arguments not based on the evidence. I hope attorneys on both sides will keep within the evidence." Counsel would have conveyed the same idea had he asked the jury what they thought would happen to the employees if they admitted they were negligent, or, do you believe a man is coming here to testify he was negligent, or what other defense could they have? Counsel should be free to argue a cause, make illustrations and draw any legitimate deduction or inference from the testimony. Counsel may argue the various motives which affect the credibility of witnesses and direct the attention of the jury to anything that reasonable men might think would lead a witness either to color his testimony or withhold the entire truth. He should not, however, advance his private opinions, as that would be encroaching on the province of the jury. A verdict should not be set aside because of remarks in argument, unless the remarks are of such a nature as to inflame and arouse the passions of the jury, or be clearly injurious to the rights of the party assailed. The effect of a single phrase or sentence upon the listener cannot be told by disconnecting it from the context of the argument. It would have been well to have omitted the remarks to which objection was made, but viewing this in connection with the rulings of the trial judge we do not think they were of such a character as to mislead or prejudice the case of appellant.

There being no reversible error, the judgment is affirmed.

Affirmed.

Herbert B. Dickinson et al. v. Charles W. Simms.

Gen. No. 4,628.

1. **JUDGMENT**—*when rendition of, error.* It is error to render final judgment without an issue and without a default.

2. **JUDGMENT**—*for purposes of reversal is a unit.* A judgment in an action at law against two defendants is an entirety and cannot be affirmed as to one defendant and reversed as to the other.

3. **ASSESSMENT OF DAMAGES**—*when making of, error.* It is error to assess damages without an issue or without a default.

4. **BILL OF EXCEPTIONS**—*when cost of incorporating and printing will be taxed against successful appellant.* Where a bill of exceptions is unnecessary to the presentation of the questions involved, the cost of the incorporation of the bill of exceptions in the transcript, as well as the cost of printing the abstract thereof, will be taxed against the successful appellant.

Action of assumpsit. Error to the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed July 17, 1906.

ARTHUR KEITHLEY, for plaintiffs in error.

JOSEPH A. WEIL, ISAAC J. LEVINSON and IRWIN L. FULLER, for defendant in error.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is a suit in the Circuit Court of Peoria county by Charles W. Simms, defendant in error, against Herbert B. Dickinson and Rosa L. Thompson, charging them as partners under the name of The Home Savings and Investment Company.

There was a special count and the common counts. Dickinson did not appear and defend, and no order of default was taken against him. Mrs. Thompson filed the general issue, a sworn plea denying joint liability with Dickinson, and a plea denying her ability to contract a partnership in the language of section six of the act concerning married women. The pleadings

Dickinson v. Simms.

and contract upon which the money was paid are the same as in the case of *Thompson v. Hoppert*, 120 Ill. App. 588. There was a trial by jury, and on the trial counsel for plaintiff Simms announced that he would rely solely upon the common counts and limit his recovery to the amount of money paid upon the contract, on the theory that the contract had been rescinded. The verdict was for Simms for \$159.30 against both defendants, followed by a judgment. Dickinson sued out a writ of error, and Mrs. Thompson came into this court and asked to be made a co-plaintiff in error, and was granted leave, and joined in assigning error. Both plaintiffs in error assign the same error. The error assigned questions the right of a court of record to render a judgment against a defendant without first defaulting him. In this case the defendant, Mrs. Thompson, had plead; the defendant Dickinson had not plead, and was not defaulted.

There is no rule of practice better or more firmly settled than that it is error to assess damages or render final judgment without an issue or without a default. *Crabtree v. Green*, 36 Ill. 278; *Lehr v. Vandever*, 48 Ill. App. 511; *Piercy v. The People*, 10 Ill. App. 218.

The judgment against Dickinson, being under the rule of these authorities unauthorized and void, must be set aside. A plaintiff having failed to ask for a default against a defendant cannot excuse the error by saying afterwards that there was an implied default; that would lead to abuses in trial courts.

A judgment against two defendants is an entirety. It must stand or fall as to both. It cannot be affirmed as to one and reversed as to another. *Black on Judgments*, sec. 211; *Williams v. Chalfant*, 82 Ill. 218; *Chalfant v. Dunne*, 129 Ill. 248; *Jansen v. Varnum*, 89 Ill. 100; *Martin v. Leslie*, 93 Ill. App. 44; *Swenson v. Erickson*, 90 Ill. App. 358. This rule is so inflexible in

actions on contract that a party may reverse a judgment in his own favor. *Kingsland v. Koeppe*, 137 Ill. 344.

The question raised by the assignment of error being raised solely upon the record, it was unnecessary and improper to incorporate into the record the bill of exceptions presented by Mrs. Thompson. The costs of incorporating the bill of exceptions in the record and printing the same in the abstract are taxed to plaintiff in error.

The judgment against Dickinson being erroneous, it cannot stand against Mrs. Thompson. The judgment, therefore, will be reversed and the cause remanded.

Reversed and remanded.

Chicago & Alton Railway Company v. Isaac M. Johnson.

Gen. No. 4,579.

1. **AMENDMENT**—*should be by separate instrument.* Amendments to pleading should be made on a separate paper and should not be permitted to be made on the face of the original pleading.

2. **PAIN**—*how proof of, made.* Any competent witness may be allowed to testify to exclamations or exhibitions of pain and suffering.

3. **EXPERT**—*when opinion of, competent.* The opinion of a medical expert as to the ailment from which the plaintiff was suffering is competent where predicated upon a physical examination and symptoms discovered without the aid of the declarations of the injured person.

4. **COLLATERAL ISSUES**—*evidence of, incompetent upon question of negligence.* Questions as to what occurred at other times than the time of the accident are improper as they would only introduce collateral issues and would not tend to prove or disprove the question of negligence at issue in the case.

Action in trespass. Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed July 17, 1906.

C. & A. Ry. Co. v. Johnson.

J. L. O'DONNELL and T. F. DONOVAN, for appellant;
WINSTON, PAYNE & STRAWN, of counsel.

REYNOLDS & PURKHISER, for appellee.

MR. JUSTICE THOMPSON delivered the opinion of the court.

This is a suit in trespass begun by appellee against appellant on April 30, 1903, for an injury alleged to have occurred February 3, 1903. The declaration consists of two counts, the first count containing the necessary allegations to state a cause of action against appellant for injuries claimed to have been sustained by appellee near the passenger depot of appellant in the city of Joliet, alleging the occupation of a part of a public street in connection with its depot for depot purposes and alleging the negligence of appellant to be the negligent loading of a baggage truck and the careless moving and jerking of such truck whereby a heavy trunk was thrown upon and injured the foot and ankle of appellee.

The second count as originally filed is in substance like the first, with the further allegation "that the servants and agents of appellant negligently and wantonly and wilfully pushed and pulled said truck negligently loaded," and that by reason of the "negligent, reckless, wanton and wilful acts," etc., of appellant, appellee was injured.

After the close of all the evidence appellant moved to exclude all the evidence and for a peremptory instruction, first as to both counts, and the motion being overruled, then as to the second count; then the appellee entered a cross-motion for leave to amend the second count by striking out the words "and wantonly and wilfully" and the words "reckless, wanton and wilful," which cross-motion was allowed, and the amendment filed upon a separate sheet of paper, and a plea filed to the second count as amended. The jury

returned a verdict for \$1,700, and a motion for a new trial being overruled judgment was rendered on the verdict.

The facts as disclosed by the evidence are that appellant's depot is on the north side of Jefferson street in the city of Joliet; on the day of the occurrence complained of appellant's passenger train came in from the north about ten o'clock in the evening, the passenger coaches stopping in front of the depot, the train extending south across Jefferson street, its baggage car being south of the street. After the arrival of the train the baggageman started towards the baggage car, from the depot, with a four-wheel truck about thirty inches high, he says loaded with one large heavy iron-bound drummer's trunk standing on end, while appellee and several witnesses say the trunks were piled three tiers high. The baggageman says he walked rapidly and called to the crowd of people to "get out of the way." There was an incline from the depot platform to the street. Appellee had gone to the train with his buggy to meet some friends whom he expected to arrive on it and was standing on the street between the curbing and the street car track near the train. He stepped back three feet out of the way of the truck, and as it passed a large trunk fell several feet from the top of the load on the truck striking his foot, permanently injuring him. No question of fact is raised by the appeal, but only questions of law.

The proposition is attempted to be made by appellant that because the amendment of the second count was not made by erasing the words "wanton and wilful," etc., upon the original declaration, but on a separate sheet, therefore the declaration stands as originally drawn, and there being no evidence of wilfulness, "that the jury were justified in looking to the declaration to see in what manner the several acts of negligence, omission of duty or wilful misconduct were charged, and that the second count of the declara-

tion became a part of the instructions which referred to the whole declaration.”

The amendment was not only properly made and filed, but was made in the manner most approved by the courts. Amendments to pleadings should be on a separate paper, and should not be permitted on the face of the original pleading. The method of amending pleadings by erasure upon the original papers has repeatedly been condemned. *Garrity v. Wilcox*, 83 Ill. 159; *Stanberry v. Moore*, 56 Ill. 472; *W. C. R. R. Co. v. Wiczorek*, 51 Ill. App. 498.

The record does not show whether the jury took the declaration to the jury room or not. If they took the original declaration they would also have the amendment, and there could be no misunderstanding about the amendment, and we are unable to see any reason for complaint in the action of the court.

Error is assigned upon the admission of evidence in this: a question was asked in cross-examination of a witness by counsel for appellant, how appellee acted while in bed. The witness answered: “He was groaning and complaining of it hurting him, and so on.” On motion all the answer after the word “groaning” was excluded. Appellant insists the whole answer should have been excluded. The ruling of the court was proper, for the reason that “Any competent witness to exclamations or exhibitions of pain and suffering may be allowed to testify to them.” They are exclamations of present pain and suffering, and the usual expressions of such feeling are original evidence. *West Chicago St. R. R. Co. v. Carr*, 170 Ill. 478.

It is insisted that the opinion of a physician who examined appellee was improperly admitted, appellant claiming said opinion was derived, in part, from subjective symptoms. The physician testified that he had been the family physician, he visited appellee professionally in February, 1903, he made an examination of the foot, found it badly swollen and examined appel-

lee at his house a few days later and on other occasions, and that he found a permanent stiffness in the instep, and the foot has to turn outward in walking. The witness, upon the cross-examination, stated he had talked with appellee, but also expressly stated his opinion was formed solely upon his personal examination and not upon any conversation, and in the direct examination the physician spoke only of his personal examination. The evidence is competent when it is stated as it is in the record in this case, the opinion being based upon the personal examination and not upon any statement of the party examined. *Illinois Steel Co. v. Delac*, 201 Ill. 150; *West Chicago Street R. R. Co. v. Carr*, *supra*.

Appellant has assigned error in the court sustaining an objection to the question, "Now, have you since that time or before, while you were using that truck or that kind of trucks, had any accident or trouble with trunks falling off?" asked on behalf of appellant of Kelly, the baggageman in charge of the truck when appellee was injured. The objection was properly sustained for the reason that whether he was negligent or exercising ordinary care, either in piling trunks three tiers high, or, as he himself puts it, "walking real fast" with a large trunk up on end on the truck down an incline to the street, hurrying through a crowd from the depot to a baggage car across a public street, would be neither proved nor disproved by what had happened to him at other times under different circumstances. The care or negligence of the employee, either in loading the truck, or managing it at other times, so that large, heavy trunks were not thrown off, or did not fall off sideways upon a crowded platform or street, at other times would only raise collateral issues, and not disprove negligence upon this occasion. *Hodges v. Bearse*, 129 Ill. 87; *M. & O. R. R. v. Vallowe*, 214 Ill. 124.

Appellant insists there was error in giving the

fourth, seventh and eighth instructions given on behalf of appellee, and argues that they were inconsistent with appellant's nineteenth. Number four is: "The court instructs the jury that, if you believe from the evidence that the plaintiff has proved his case as laid in his declaration herein, or either count thereof, then you will find the issues for the plaintiff." This instruction has been so repeatedly approved by the Supreme Court that this court cannot add to what that court has said. *Laffin & Rand Co. v. Tearney*, 131 Ill. 325; *Penn. Co. v. Marshall*, 119 Ill. 399; *Ry. Co. v. O'Sullivan*, 143 Ill. 48. The appellant's nineteenth instruction told the jury that if they believed from the evidence "said baggageman placed said trunk upon said truck in an ordinarily careful and prudent manner, and said trunk fell off said truck and injured plaintiff, and that the falling off of said trunk was due to an accident that could not have been foreseen by the use of ordinary care and prudence," then they should find the defendant not guilty. There was nothing inconsistent with the instructions for appellee, as is claimed by appellant. Each was dependent for its effect upon what the jury believed the evidence proved, and stated the legal result that would follow the finding of facts, as each party claimed the facts were upon a consideration of all the evidence.

The instructions were unobjectionable, we have not been able to find any error in the case, and it will be affirmed.

Affirmed.

Mr. Presiding Justice DIBELL, having tried this case in the court below, took no part in this court.

Jennie M. Scott v. Mary A. Goode et al.

Gen. No. 4,594.

1. **SCHOOL TRUSTEES**—*power to transfer negotiable instrument.* A negotiable instrument in the hands of school trustees is invested with all its usual attributes and such trustees have power to transfer by indorsement the same title as an individual holder would have.

2. **NEGOTIABLE INSTRUMENT**—*how title to, cannot be transferred by school trustees.* Title to a negotiable instrument cannot be transferred from school trustees except by such trustees in their corporate capacity; an indorsement by their agents is a nullity.

Foreclosure proceeding. Appeal from the Circuit Court of Rock Island county; the Hon. E. C. GRAVES, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed July 17, 1906.

W. K. TRIMBLE, for appellant.

ADAIR PLEASANTS, for appellee.

MR. JUSTICE WILLIS delivered the opinion of the court.

This is an appeal from the Circuit Court of Rock Island county, Illinois, brought to reverse a decree sustaining a demurrer to a proceeding in chancery to foreclose a mortgage. The facts underlying the action, as stated, first, in a bill filed in the names of the then trustees of schools for a township in Rock Island county, Illinois, for the use of the appellant herein, against Mary A. Goode et al., and in an amended bill subsequently by leave of court filed in the name of Jennie M. Scott, the appellant, for her own use against the same defendants, in substance are, that on November 3, 1884, one Benjamin Dill, being indebted to the then trustees of schools of Andalusia township, Rock Island county, Illinois, in the sum of two hundred dollars, made, executed and delivered to the trustees his promissory note and mortgage deed for

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that amount, with interest payable half-yearly, due in five years after date. The mortgage conveying certain lands with appurtenances in Rock Island county to secure said note, was duly recorded. All the interest accruing on the note up to the 3rd day of November, 1897, was paid by Benjamin Dill or by his grantees of the mortgaged premises, to the trustees of schools or to some one for them. On August 25, 1903, the board of school trustees, by Messrs. Searle and Marshall, their agents and attorneys, indorsed upon the note the words and figures following:

“ROCK ISLAND, ILL., Aug. 25, 1903.

This is to certify that the payee herein hereby acknowledges the receipt of \$200.00 in full payment and satisfaction of the above note.

By BOARD OF TRUSTEES, aforesaid,

SEARLE and MARSHALL, its agents and attys.”

The appellant paid to Searle and Marshall for the board of school trustees a good and valuable consideration for the note with the indorsement written thereon and obtained its possession, and on October 19, 1903, the mortgage and note were transferred by the board of school trustees, by a separate instrument of assignment, to Jennie M. Scott, appellant, and the assignment was recorded. The title to the premises conveyed by the mortgage passed from Benjamin Dill through several grantors and grantees, and vested in Daniel Goode, he assuming the mortgage thereon by a warranty deed dated December 4, 1899. On the 7th day of January, 1902, Daniel Goode died intestate, leaving Mary A. Goode, his widow, and Ethel Goode, Lester Goode and Raymond Goode, his heirs. On January 25, Albert E. Simmons was appointed administrator of the estate of Daniel Goode, deceased. After the death of Daniel Goode default was made in the payment of taxes on the mortgaged premises, and a redemption was had by appellant. Afterwards de-

fault was made in the payment of the principal and interest due on the note.

We cannot adopt the appellees' construction of the statute empowering trustees of schools to conduct the business necessary for the proper maintenance of schools. We hold that the statute authorizes them to take notes, bonds and other negotiable securities, and when a promissory note is once in their ownership it retains all its negotiable qualities, is as much a promissory note as ever, and is governed by the laws of negotiable instruments, and the school trustees, in their corporate capacity, have the power to sell and transfer the same, investing the purchaser with the legal title thereto; and if, as appellees urge, the possession of such power by the trustees of schools is a menace, and its exercise might lead to great abuse, and cause the destruction of the trust and the annihilation of the school system, it is for the legislature to apply the correction.

The trustees of schools cannot transfer title of its negotiable instruments by its agents or attorneys at law, but can do so by its corporate action only, and the indorsement written on the note by Searle and Marshall, agents and attorneys for the board of school trustees, did not transfer the legal title thereof from the board of trustees and vest it in Jennie M. Scott, the appellant, and the language of the indorsement would not, if reformed, as urged. If she had purchased the note from the board of trustees without an assignment, she would be entitled to use the names of the trustees in a proceeding to foreclose the mortgage in order to collect the debt evidenced by the note. It follows that she cannot sustain the amended bill, because she has not the legal title to the note, and she did not make the trustees parties either complainant or defendant in the amended bill. The original bill in the name of the trustees for her use was a proper one, under which the equities of all the parties thereto could have been de-

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terminated and adjusted. If, as the demurrer admits, the money paid by appellant to Messrs. Searle and Marshall, agents and attorneys of the school trustees, was not intended to be in satisfaction or payment of the note, but for the purchase price and its transfer to appellant, and the form of the indorsement was a mutual mistake of the parties, then the debt has not been paid, and the trustees of schools have a right to maintain a bill to foreclose the mortgage, and the defendants are not concerned for whose use the suit is prosecuted. The decree will be reversed and the cause remanded, with directions to overrule the demurrer to the original bill.

Reversed and remanded with directions.

Rosa L. Thompson v. Charles W. Simms.

Gen. No. 4,701.

This case is controlled by the decision in *Dickinson v. Simms*, ante, p. 18-20.

Action of assumpsit. Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREENE, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed July 17, 1906.

ARTHUR KEITHLEY, for appellant.

JOSEPH A. WEIL, ISAAC J. LEVINSON and IRWIN L. FULLER, for appellee.

PER CURIAM. This cause, being an appeal from the Circuit Court of Peoria county, is the same controversy with the same parties as *Dickinson v. Simms*, ante, p. 18-20, in which appellant herein was one of plaintiffs in error upon her own motion. It being disposed of by the reversal of *Dickinson v. Simms*, supra, wherein

appellant was plaintiff in error, it is unnecessary to consider the other errors assigned by appellant.

Judgment reversed and cause remanded.

Reversed and remanded.

Schillinger Bros. Company v. Ernst E. Smith.

(Gen. No. 4,572.)

1. **PEREMPTORY INSTRUCTION**—*when should not be given.* Where there is evidence tending to prove the plaintiff's cause of action, a peremptory instruction should be denied.

2. **SAFE PLACE TO WORK**—*master's duty to furnish.* It is the duty of a master to use reasonable care to furnish his servant with a safe place to work, and the performance of this duty cannot be delegated.

3. **ASSUMED RISK**—*when doctrine of, does not apply.* Where the risk in question is not obvious, the doctrine of assumed risk does not ordinarily apply.

4. **SPECIAL FINDINGS**—*how effective to cure defects in general verdict.* The general verdict may be aided and irregularities cured by special findings.

5. **FOREMAN**—*what evidence admitted to prove character of workman as, will not reverse.* The fact that a witness in the course of his testimony called a workman "boss" is not ground for reversal where all the facts and circumstances were before the jury.

Action on the case for personal injuries. Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906. Rehearing denied July 17, 1906.

DANIEL McCASKILL & SON, for appellant.

JOHN W. D'ARCY, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

At the time the injuries sued for in this case occurred appellant was engaged in erecting a building, the walls of which were constructed of fire proof tile, and had

in its employ in doing the work a number of laborers, including appellee. As the walls were built up, scaffolding was provided upon which the men stood to do their work, and upon which materials were placed. The scaffold was about fifty feet long, six feet wide and fourteen feet high at the time of the accident, was standing along the north wall of the building and was constructed of boards laid on wooden horses. Some of these horses had been previously used for lower scaffolds in other parts of the building and their legs which were composed of two by four timbers had to be lengthened by splices to get the required height for work on the north wall. Two of these horses near the center of the scaffold were lengthened four feet by nailing two boards to them one inch thick and six inches wide. In doing this work six-penny nails were used. Previous to the time the tile setters went to work the morning of the accident there had been placed on the scaffold a large number of tile of considerable weight, to be used in building the wall. Appellee was a tile setter. Upon arriving at the building the morning of the accident he changed his clothes and at once went upon the scaffold to begin work. Almost immediately upon his getting on the scaffold the spliced legs of the wooden horses gave way, throwing him to the floor below, and for injuries he claims to have thereby sustained he brought this suit and obtained a verdict for \$4,800. The court overruled a motion for a new trial and rendered judgment on the verdict in favor of appellee for the amount of the verdict and interest thereon from the date of its return by the jury to the date of the rendition of the judgment, which was about two months later. From that judgment this appeal is prosecuted.

It is first contended by appellant that the fall of the scaffold was caused by its being overloaded and that the overloading was done by Mueller, a fellow-servant of appellee, and for that reason there can be no re-

covery. The evidence shows that helpers at Mueller's direction placed the tile on the scaffold before the men went upon it to work and before appellee arrived at the building. Appellee contends that Mueller had charge of and directed the men engaged in laying the tile in the wall and stood in the relation to them of vice principal. The witness Trumbull testified he was helping the tile setters, that Mueller was the boss tile setter and directed appellee to go upon the scaffold. He further testified that Mueller directed appellee and other tile setters in their work, gave orders for placing tile and mortar on the scaffold and that no one else did, that appellant's foreman, Mr. Henderson, was not in the tile setting department and had nothing to do with directing the men in that work as he understood it, but was in the concrete department overseeing the work there and that he never saw any one but Mueller directing the tile setting and the men engaged therein. The witness says he helped to place the tile on the scaffold and told Mueller they were placing too many upon it, but Mueller replied he was doing the job and told witness to mind his own business. Phillip Reitz testified he was employed at the building and heard Mueller give orders to the tile setters. Appellee testified he was hired by Mueller, that Mueller was foreman of the tile setters and that he received instructions from him the two days he worked there before his injury and that he went upon the scaffold the morning of the accident at his direction. For appellant, Sidney G. Henderson testified that he was appellant's foreman in charge of the construction of the building, that he hired and discharged the men and kept their time and looked after the work in general. He testified Mueller was a tile setter, that he gave him no authority to direct or superintend the men at work with him any more than any other tile setter. G. A. Schillinger testified he was president of appellant and manager of the affairs of his company, that he em-

ployed Henderson as foreman of the work of constructing the building and that he had charge of the job. He further testified he put Mueller to work on the building and gave him no authority to hire or discharge men or to superintend the work.

Whatever may have been the purpose and intention of appellant in placing Henderson in general charge of the work, the proof shows he was not himself a tile setter or brick mason, but his special line was concrete work, and that Mueller, who was a tile setter and who was engaged in the work there and had been for some time when appellee began work, did direct the men engaged in that work, cannot be successfully controverted. That Henderson must have known Muller was assuming to exercise authority over the men engaged in building the wall is shown by the witness Trumbull, who testified that not a great while before the accident happened, Henderson and Mueller had a difficulty about the control of some man and Mueller told Henderson he was not his boss, that he, Mueller, "was sent here to overstruct this work." Under all this testimony the court would not have been justified in holding as a matter of law that Mueller and appellee were fellow-servants, if liability had been dependent upon that question alone. Where there is evidence tending to prove plaintiff's cause of action the question should be submitted to the jury for determination. Ill. Southern Ry. v. Marshall, 210 Ill. 562, and cases there cited.

It is not denied by appellant that the scaffold was defective in construction on account of the manner in which the legs of the two wooden horses were spliced and that it was the giving way of these that resulted in appellee's injury, but, as before stated, the contention of appellant is that the overloading of the scaffold was the proximate cause of its falling and not the defective construction. The splicing of the wooden horses was not the work of the tile setters or the helpers, but was done by a carpenter. Appellant owed ap-

pellee the duty of using reasonable care to furnish him a safe place to work, and if its failure to exercise such care caused the injury without the fault or negligence of appellee, the liability would be established, and such liability cannot be escaped by the master having delegated the performance of that duty to another person, who may for some purposes be a fellow-servant of the party injured. *Metcalf Co. v. Nystedt*, 203 Ill. 333; *C. & A. R. R. Co. v. Maroney*, 170 Ill. 520; *Spring Valley Coal Company v. Rowatt*, 196 Ill. 156.

The jury found in answer to a special interrogatory submitted by appellant that the proximate cause of appellee's injuries was not the overloading of the scaffold. Inasmuch as the scaffold fell because of the splices giving way and not on account of any other defect of the structure, it is reasonable to conclude that if the legs of the wooden horses had been long enough without splicing or if the splicing had been done in a more careful and thorough manner there would have been no fall.

Doubtless if there had been no tile or other weighty material placed on the scaffold it would not have fallen, so that while it is true there would have been no fall had it not been for the heavy weight placed on the scaffold, it is also true there would have been no fall had there been no defective construction. Appellant insists that the special finding of the jury is contrary to the weight of the evidence and that *Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, is conclusive of this question. In that case a heavy iron post used as a barber sign had been erected near the outer edge of the sidewalk without having been very securely fastened. Eighteen months after the post had been thus placed, a driver of one of appellant's wagons, in backing up to the sidewalk with a heavy load, struck the post, knocking it down and injuring a passer-by. Suit was brought against *Wolff Mfg. Co.*, employer of the driver, and a recovery had which was sustained by the Appellate

and Supreme Courts. One of the defenses interposed was that the proximate cause of the injury was the defective manner in which the post had been fastened, but the Supreme Court held that the manner in which the post stood on the sidewalk was not in itself dangerous, that the natural and probable result of so placing it was that it would remain there, and that but for the intervention of a new force sufficient to overthrow it no injury would have resulted. We think there is a wide distinction between that case and this one. In that case the pole was intended for no other use or purpose than to stand on the sidewalk as a sign and was not intended to withstand a force such as a heavily loaded wagon backing against it. In this case the scaffold was constructed and erected for the very uses it was being put to when the accident happened, and while the proof shows it was supporting a heavy load it is evident it would have borne it but for the defective construction.

It is contended also that the dangerous condition of the scaffold including its construction and being overloaded was obvious and apparent to appellee and every one else working there and that in attempting to use it he assumed the risk of being injured thereby. We cannot agree with this position of appellant. As we understand the evidence, appellee was not present when the splicing was done and the scaffold placed along the wall where it stood when the accident happened, nor when the load was placed thereon. When he arrived at the building the morning of the injury he went at once behind some object, changed his clothes and following the direction of Mueller went immediately upon the scaffold which at once fell. Although appellee says he looked at the scaffolding before he went upon it, it is apparent he could not in the short time that elapsed after he arrived at the building before doing so have had much opportunity to have observed either its defective construction or the weight of the load upon it. The defects were of a character

not readily observable and its position against the wall was such that one standing on the floor could not easily see the amount of the material on it. The question whether appellee's injury resulted from an assumed risk of his employment was properly submitted to the jury as a question of fact, and in our opinion we would not be justified in disturbing their finding and the judgment rendered thereon. *Himrod Coal Co. v. Clark*, 197 Ill. 514; *City of LaSalle v. Kostka*, 190 Ill. 130; *Ehlen v. O'Donnell*, 205 Ill. 38.

The second count of the declaration avers that the fall of the scaffold was caused by its being negligently and carelessly overloaded by agents, servants and employees of appellant, but does not aver they were not fellow-servants of appellee. On appellee's motion the court gave to the jury the following instruction:

"If the jury believe from the evidence that the plaintiff has proved the allegations contained in his original declaration, and the additional counts thereto, or any one of said counts, by a preponderance of evidence, and if the jury believes from the evidence that the plaintiff was injured as alleged in such count or counts, and if you believe from the evidence that the plaintiff, at the time of such injury, if any, was in the exercise of reasonable care for his own safety, and if you further believe from the evidence such injury, if proved, was caused by or through the negligence of the defendant as alleged in the same count or counts of the declaration, and if you believe from the evidence that said injury, if any, was not the result of a risk assumed by the plaintiff, then the plaintiff is entitled to recover such damages as you may believe from the evidence will compensate him for the injury so sustained."

It is urged that as said second count did not state a cause of action and was so defective that it could not be aided by verdict, the instruction referred to is reversible error. The jury having found specially that

overloading the scaffold was not the proximate cause of the injury, it would seem clear the general verdict was not based on that count. The effect of the special finding was that defendant was not guilty under the second count. The instruction was therefore harmless, as the jury must have found for appellee under other counts. The general verdict may be aided and irregularities cured by special findings. 29 Am. & Eng. Ency. of Law, 2nd ed., 1034, note 6.

It is also urged that the court erroneously permitted appellee to introduce evidence as to the construction of the scaffold and the material used therein. Such testimony was held competent in *Jenks v. Thompson*, 179 N. Y. Court of Appeals, 20. It is also claimed the court erred in permitting the witness Trumbull to testify that Mueller was boss. It is true the witness did speak of him as "boss", but he testified fully as to the acts and conduct of Mueller with reference to the work and the men engaged with him therein which led him to call him boss, and as the jury had all these facts before them, we do not think the mere fact that the witness called him "boss" in his testimony worked any harm or prejudice to appellant.

Lastly, it is contended the verdict is excessive. The evidence shows appellee's arm was broken and that he was otherwise painfully injured by the fall. It also tends to show that Bright's disease with which he has been afflicted since the accident, resulted from the injuries then sustained. We are unable to say the damages are so clearly excessive as to call for a reversal of this judgment. For that reason, and believing there is no reversible error in this record the judgment is affirmed.

Affirmed.

Mr. Justice DIBELL, having tried this case in the court below, took no part in its consideration here.

**Atchison, Topeka & Santa Fe Railway Company v. The
People of the State of Illinois.**

Gen. No. 4,606.

1. **PENAL**—*action in which treble damages may be recovered not.* The fact that treble the actual damages sustained is authorized by the statute fixing the remedy, does not render the action penal.

2. **RAILROAD ACT**—*sections 22 and 23 construed.* Sections 22 and 23 of the Railroad Act are to be construed together.

3. **RAILROAD ACT**—*what not defense under sections 22 and 23.* It is not a defense to an action under sections 22 and 23 of the Railroad Act to show that a shortage of cars was caused by virtue of their use at other places and points.

4. **JUDICIAL NOTICE**—*of what taken.* Judicial notice will be taken of the fact that a railroad company's usual method of transporting grain is in cars.

5. **DECLARATION**—*when states cause of action under sections 22 and 23 of Railroad Act.* A declaration under sections 22 and 23 of the Railroad Act which alleges that the defendant company refused to furnish cars in order to transport grain states a cause of action and is equivalent to an allegation that such company refused to "take, receive and transport" such grain.

6. **RAILROAD**—*duty of, to furnish transportation facilities.* A railroad corporation owes to the public the duty of providing adequate facilities for the transportation of such commodities as it is engaged in handling, and these facilities must be sufficient to take care of the business that is usually and ordinarily done along the line of the road.

7. **REMARKS OF COUNSEL**—*when improper, will not reverse.* Remarks of counsel though improper will not reverse, unless it appear that prejudice has resulted.

Action under sections 22 and 23 of the Railroad Act. Appeal from the Circuit Court of LaSalle county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed June 1, 1906.

ROBERT DUNLAP, REEVES & BOYS and LEE F. ENGLISH, for appellant.

C. S. CULLEN and BROWNE & WILEY, for appellees.

MR. JUSTICE FARMER delivered the opinion of the court.

Christian G. and Charles V. Sauer, for whose use

this suit was brought and who will hereafter be called appellees, are partners under the firm name of C. G. Sauer & Son and engaged in buying and shipping grain, in the Village of Dana, LaSalle county, Illinois. Appellant's railroad is the only one running through said village. Appellees own a warehouse or grain elevator situated on or near to appellant's side track in which they receive grain purchased from farmers and from which they load it on cars to be shipped to market. The elevator was constructed for receiving and handling corn in one part and oats in another. On the 19th day of December, 1902, the corn portion of the elevator was substantially full. The oats part was filled by January 15, 1903. Appellees had purchased from farmers in the surrounding country large quantities of corn and oats, which could not be delivered until the grain on hand at the dates mentioned or at least a portion of it had been shipped out. On December 19, appellees made a request of appellant, through its station agent at Dana, for cars in which to ship out corn. Requests and demands for cars in which to ship out grain were made sometimes verbally and sometimes in writing, substantially every day from December 19, 1902, to March 17, 1903. The number of cars demanded on the different dates varied from five up to thirty. Between December 19 and March 17 appellant furnished appellees twenty-two cars. On no day was more than one car furnished, except January 3 and February 16, on each of which dates two cars were furnished. Appellees claimed, and the proof shows, that between the dates mentioned, December 19 and March 17, the price of corn and oats declined, and appellees brought this suit under sections 22 and 23 of the Act in relation to fencing and operating railroads (see sections 84 and 85, chap. 114 Hurd's Revised Statutes, 1903), to recover treble the damages claimed to have been sustained. The counts of the declaration upon which issues were joined, in substance charged that appellees were on

the 17th of March, 1903, and had been for more than a year prior thereto, engaged in buying, selling and shipping grain in the village of Dana and in the conduct of said business owned, possessed and operated for storing and handling grain for shipment, a warehouse or elevator situated immediately adjacent to the tracks of defendant, that Dana was a regular station and stopping place on defendant's railroad for taking, receiving, transporting and discharging freight and passengers, and that there was no other line of railroad passing through said village and that from December 16, 1902, to March 17, 1903, plaintiffs owned and had at all times in their warehouse large quantities of corn, oats and wheat for shipment over defendant's railroad. The declaration then avers that on said December 16, and on each succeeding day down to and including said March 17, plaintiffs offered their grain to the defendant at said station and stopping place for shipment and demanded of defendant suitable and sufficient cars for the shipment of said grain, and were ready and willing to pay the freight charges if demanded, but that in accordance with the universal custom no such requirement or demand was made, that it thereby became and was the duty of defendant to furnish plaintiffs within a reasonable time after the demand suitable cars in sufficient numbers for the transportation of said grain, but regardless of its duty in the premises, defendant "wholly neglected and refused to run in on its tracks or furnish to Sauer & Son, within a reasonable time, cars suitable in kind and sufficient in quantity for the transportation of said grain; contrary to the form of the statute in such case made and provided."

Defendant pleaded *nil debet* and a special plea averring that from the 16th day of December, 1902, down to and including March 17, 1903, defendant owned and operated a line of railroad 5051 miles in length, along which there were 463 stations from which grain was shipped over its road, from many of

them more grain than from Dana, that upon the date mentioned and during all the time from December 16 to March 18 defendant had cars sufficient to transport all grain ordinarily offered for shipment on its line, but between said dates there was an unusual and unprecedented demand for cars and that for that reason defendant was unable to furnish plaintiffs suitable and sufficient cars for the shipment of their grain on the days they were demanded, but that it did furnish them cars as soon after the 16th of December as it could and from time to time after said day and before March 17 did furnish plaintiffs cars and transport such part of their grain offered for transportation as it was able to do; that defendant furnished plaintiffs cars and transported their grain as soon as it was able to do so, having due regard to the rights of other shippers who had demanded cars before plaintiffs had; that during all the time from December 16 to March 17 all of defendant's cars that were suitable to transport grain in were in actual use on its road or had been furnished to others at different stations along its line to answer demands for cars for shipping grain and other commodities, and that defendant had no cars between December 16 and March 17 except those furnished plaintiffs that could be taken to Dana. Replications were filed by plaintiffs and issue joined. A trial was had by jury resulting in a verdict for plaintiffs for \$1,250. Motions for a new trial and in arrest of judgment were overruled and judgment rendered on the verdict, from which judgment this appeal is prosecuted.

Among other questions raised by this record it is contended by appellant that the suit is upon a penal statute and is therefore a penal action, that the declaration does not state a cause of action, and that the evidence did not warrant a recovery. As before stated, this suit is based upon sections 22 and 23 of the Act in relation to fencing and operating railroads. Those sections are as follows:

Sec. 22. "Every railroad corporation in the state shall furnish, start, and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight or fare legally authorized therefor, if payment shall be demanded, and such railroad companies shall at all junctions with other railroads, and at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages for at least one half hour before the arrival of, and one half hour after the arrival of any passenger train, cause their respective depots to be open for the reception of passengers, said depots to be kept well lighted and warmed for the space of time aforesaid."

Sec. 23. "In case of the refusal of such corporation or railroad company, or its agents, to take, receive and transport any person or property, or to deliver the same within a reasonable time, at their regular or appointed time and place, or to keep their said depots open, lighted and warmed according to the provisions of the preceding section of this act, such corporation or railroad company shall pay to the party aggrieved, treble the amount of damages sustained thereby, with cost of suit; and in addition thereto, said corporation or railroad company shall forfeit a sum of not less than twenty-five dollars, nor more than one thousand dollars for each offense, to be recovered in an action of debt, in the name of the People of the State of Illinois—the treble damages for the use of the party aggrieved, and the forfeiture for the use of the school fund of the county in which the offense is committed."

Counsel have cited no Illinois case nor have we been able to find one where the question has been presented to the Supreme or Appellate Courts of this state as it is here presented. Undoubtedly the provision of section 23 which authorizes the recovery of a penalty for the benefit of the school fund is penal and a suit brought to recover that penalty would be a penal action. But it is contended by appellees that the provision of said section authorizing the recovery of treble damages for the use of the party aggrieved is not penal but remedial. In other words, the statute should be construed to be penal or remedial according to the form of the recovery sought under it.

The only Illinois case to which our attention has been called where the suit was brought to recover treble damages under the statute here involved, is *L. & St. L. R. R. & Coal Co. v. The People*, 19 Ill. App. 141, affirmed in 122 Ill. 506. That suit was originally brought in assumpsit to recover simple damages for a failure or refusal to furnish cars to transport coal. More than two years after the cause of action accrued an amended declaration was filed declaring for treble damages under sections 22 and 23 of the statute. To the amended declaration defendant pleaded the two-year Statute of Limitations. A demurrer to this plea was sustained by the trial court. Just what the judgment was in that court is not stated in the opinion of the Appellate Court, but the cause was taken to the Appellate Court upon appeal by the defendant. That court held the trial court erred in sustaining the demurrer to the plea of the two-year Statute of Limitations, and, in the opinion, referred to the statute as penal and the suit to recover thereunder as a penal action. From the best understanding we can get from reading the opinions of both the Appellate and Supreme Courts, it was not contended by plaintiff that the provision authorizing a recovery of treble damages was not penal, but it was insisted by the plaintiff and not denied by defendant that other

amended declarations were filed prior to the one filed more than two years after the cause of action accrued, but as the latter was the only one contained in the record before the Appellate Court, it was the only one considered. A number of other Illinois Supreme and Appellate Court cases are cited by appellant to support the contention that this is an action on a penal statute. We have examined them, and while some of the cases were under similar statutes to the one here involved and they were denominated penal statutes, yet it does not appear that the question whether they were penal or not was controverted and discussed or even raised. So far as appears from the opinions in all the Illinois cases cited, the court was never asked to determine whether a statute authorizing the recovery of more than actual damages by the party injured was remedial or penal. The direct question has been before the courts of numerous other states, and while the decisions are conflicting, we believe it will be found the weight of the best considered cases sustains the position that the provision of the statute here invoked is remedial, and the suit therefore not a penal action.

Reed v. Inhabitants of Northfield, 13 Pick. 94, was an action under a statute allowing a party injured to recover double damages for an injury caused by a defect in a highway. The point as to whether the statute was remedial or penal was directly raised and in an able opinion by Chief Justice Shaw, wherein many authorities are cited and commented on, it was held to be remedial. In the opinion it is said: "In the present case we think the action is purely remedial and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury for a failure to perform that duty. The law gives him enhanced dam-

ages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." Then after citing and quoting from *Stanley v. Wharton*, 9 Price, 301, where it was held a statute authorizing a recovery of double damages for a certain injury was remedial, the court further said: "It appears to us that this is an action of similar character, and that in form and substance it is a remedial action."

In *Burnett v. Ward*, 42 Vermont, 80, this question is considered at great length. The opinion is interesting and exhaustive, but is too long to quote more than a few sentences from. That suit was brought by the owner of sheep against the owner of a dog to recover double damages under a statute making the owner or keeper of a dog liable to the party injured for double the damages caused by the dog worrying, wounding or killing sheep. It was contended by the defendant that the trial court erred in adopting the rule of evidence applicable to the common law action of trespass. The court said: "But it is insisted that this rule (the rule in criminal cases) applies to actions upon penal statutes for penalties and that this suit is penal so far as it allows a recovery in excess of actual damages; and therefore the same rule ought to apply to it. But where, as in this case, the main purpose of the action is the recovery of compensation in damages, the right to recover cumulative damages is incidental, and the statute is a remedial statute in contradistinction to penal statutes. * * * The only reason why the statute is penal that can be urged is that the plaintiff recovers more than his actual damages. But there are many cases in actions of tort in which the plaintiff may legally recover more than his actual damage, as in trespass to person or property." In this and the Massachusetts case above mentioned many cases, American and English, are collected sustaining the court's view, and as they will be found by reference to those cases they need not here be cited.

Stockwell v. United States, 13 Wall. 531, was a suit by the government to recover double the value of certain importations of shingles alleged to have been illegally imported, received and concealed. The statute authorized a recovery of double the value of the property, and it was contended by the defendant that it was a penal statute. In concluding the discussion of this subject the court say: "It (the statute) must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrong-doer is measured by double the value of the goods received, concealed, or purchased, instead of their single value."

Aylsworth v. Curtis, 19 R. I. 517, 61 Am. St. R. 785, was a suit to recover twice the value of property of the plaintiff, alleged to have been stolen by the defendant. It was brought under a statute which provided that when a person was convicted of larceny he should be liable to the owner of the property for twice its value, unless the property had been restored, and in case of restoration, then such convicted party should be liable for the value of the property. Pending the suit the plaintiff died, and it was contended by defendant that it was a penal action and therefore did not survive. The court held the statute under which the suit was brought was remedial and not penal and that the action survived. In discussing the distinction between penal and remedial statutes the court said: "But where it is a statute which is merely declaratory of a common law right, coupled with a means or way enacted for its enforcement, giving a remedy for an injury against the person by whom it is committed to the person injured, and either limiting the recovery to the amount of loss sustained or to cumulative damages as compensation for the injury, it is a remedial statute." This opinion is also well sustained by a large number of authorities cited therein.

While there are cases not in entire harmony with this view, we have found none where the question has

been so well considered as in the cases to which we have referred and the cases cited and quoted from by the courts in those cases. The provision relating to a forfeiture, to be recovered for the use of the school fund, is penal, because there is no element of compensation to an injured party, but merely punishment to the wrongdoer. A statute may be remedial in one part and penal in another. Sutherland on Statutory Construction, vol. 2, sec. 337; *Aylsworth v. Curtis*, *supra*. Under the provision of the statute invoked in this case, it is an indispensable prerequisite to a recovery, that the party suing should have sustained damages. The allowing of treble the damages sustained is only an enlargement of a common law right and its primary basis is compensation. There are many cases where the law allows in addition to the actual damages sustained, a further sum as punitive damages by way of punishment, and in such actions, as in the case at bar, the recovery is for the benefit of the party injured. Here, as in *Reid v. Inhabitants of Northfield*, *supra*, plaintiffs set out the duty of defendant to furnish cars, its refusal to do so and consequent damages therefrom. "The law gives him enhanced damages, but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." Our conclusion therefore is that the provision of the statute under which this suit was brought is remedial and not penal, and the rules applicable to remedial statutes are the proper rules to apply to it.

Appellant insists that the declaration does not state a cause of action. The point is made that the declaration is based on that clause of section 22 which makes it the duty of every railroad corporation to "furnish, start and run cars for the transportation of such passengers and property as shall within a reasonable time previous thereto be ready and offered for transportation at the several stations on its railroads," and that the liability provided for in section 23 is the refusal to "take, receive and transport any person or

property, or to deliver the same within a reasonable time," etc. The declaration charges that appellees had their grain ready, offered it to appellant for shipment and transportation at its station and demanded cars for that purpose, but that appellant "wholly neglected and refused to run in on its tracks, or furnish to Sauer and Son, within a reasonable time, cars suitable in kind and sufficient in quantity for the transportation of said grain." In our opinion these two sections of the act must be construed together and the violation of the duties enjoined upon railroad companies by section 22 creates the liability for damages or penalty provided in section 23. Section 22 makes it the duty of a railroad company to furnish and run cars and to take, receive and transport persons and property. The only object for requiring such company to start and run cars, is to enable it to take and transport persons and property. While section 23 does not mention as one of the causes of liability the refusal to furnish and run cars, it does mention the refusal to take and transport persons and property, which, as we have said, is the only object for requiring cars to be furnished and run. It will be seen, the declaration alleges appellees had ready and offered appellant their grain for shipment and transportation, but that appellant refused to furnish cars for that purpose. We may take judicial notice that appellant's method of transporting grain was in cars. Unless it provided or furnished cars for that purpose it could not "take, receive and transport" the grain, and we are unable to distinguish any substantial difference between an allegation that appellees had ready and offered their grain at the station for shipment, but appellant refused to furnish them cars for that purpose, and an allegation that appellant refused to "take, receive and transport" it. A refusal by appellant to furnish the only means it had for transportation would be a refusal to receive and transport. This we understand to be the construction put upon

these two sections in *I. & St. L. R. R. & Coal Co. v. The People*, 19 Ill. App. 141.

It is very earnestly contended that appellant's proof under its special plea entitled it to a verdict of not guilty. It is not denied that appellees had the grain in their elevator ready for shipment and demanded cars for its shipment every day from December 19 to March 17, following, and that during all that time only twenty-two cars, an average of one every four days, a wholly inadequate number, were furnished appellees and that they were damaged in consequence thereof. While the plea avers that defendant had sufficient cars to transport all grain ordinarily offered for shipment, but that it was prevented from furnishing them in the quantities demanded by appellees on account of an unusual and unprecedented demand for cars, it sought to prove also that on account of the anthracite coal strike in the east many of its cars had been used for carrying bituminous coal over other lines of railroad and were not promptly returned, and also that on account of an unusual drought in New Mexico during the winter of 1902 and 1903, appellant had in that territory a large number of cars it was unable to move by reason of inability to procure a sufficient quantity of suitable water to supply its motive power. C. W. Kouns testified he was superintendent of transportation for appellant and had supervision of the movement of passengers and freight and the distribution of cars between the several sections of the line, that during the winter of 1902 and 1903 appellant had from fifteen to sixteen thousand box cars suitable for the shipment of grain, but during that period more cars were demanded than had ordinarily been the case during the same period in previous years. He also testified that cars were returned very slow from points on other lines where they had been used to haul coal on account of the strike in the anthracite mines and that on account of an in-

sufficient supply of suitable water a large number of cars in New Mexico could not be moved, and that these conditions affected appellant's ability to furnish cars to shippers, such as appellees. The witness testified that appellant's system for the distribution of cars was based upon daily reports received which embraced an inventory of all cars at every station along the entire line of railroad. These reports are made at a certain hour each day and cover the twenty-four hours preceding the report. Upon receipt of the report the distribution of cars is made by the witness among the different divisions or districts according to the demand for them and the number available. The witness made the apportionment to the divisions, and the divisions or district employees made the distribution to the stations of the different districts. The division of the road in which Dana was situated extended from Chicago to Kansas City with a branch from Lexington, Mo., to St. Joseph, Mo., and a branch from Ancona to Pekin, Illinois. F. F. Dolan was superintendent of that division and George H. Sanders had charge under him of the distribution of cars in that part of the division which included Dana. Kouns also testified appellant had during the winter of 1902 and 1903 a sufficient number of suitable cars for the shipment of grain to meet the ordinary requirements during that period and that according to his recollection it had a sufficient number to meet the ordinary demands for the corresponding period during each of the five years previous. The witness necessarily had to depend upon the reports made to him by his subordinates for the information upon which he based his orders and for many of the facts and conditions testified to by him. He did not pretend to know how the cars on the different divisions were handled by his subordinates, but only testified as to the system of appellant. Whether empty cars in large numbers stood idle in the yards and on the tracks of appellant for considerable periods

of time that should and could have been furnished shippers for the transportation of grain, witness did not know, only from the reports made to him by others. Sanders testified he had charge of the distribution of cars on the division which includes Dana, but he rarely gave the subject of the distribution of cars between the different stations on his division any attention, but entrusted it, he says, to the chief dispatcher, and the distribution of cars to Sauer & Son was handled by him. Sanders also testified the volume of business offered appellant during the month of December, 1902, and the three succeeding months, was greater than it had been for the corresponding period for some years next preceding, and that appellant's equipment of box cars was sufficient to transact the business offered the railroad prior to December, 1902. L. D. Knox, car distributor for the C., B. & Q. R. R., testified that during December, 1902, and the three months following there was an unusual amount of property offered for shipment from east to west, probably twice or three times as much as had been offered during the corresponding period in previous years. John M. Daly who was superintendent of transportation for the I. C. R. R. Co. during the winter of 1902 and 1903 testified that during that period there was an extremely heavy demand for cars on his road and that one of the main causes of it was the anthracite coal strike which largely increased the demand for cars to carry bituminous coal, and that similar conditions had not prevailed for the corresponding period during the five previous years. H. B. Forsyth was train dispatcher for appellant and testified he had to do with the distribution of cars on the division which included Dana during the winter of 1902 and 1903, that orders for cars for that station were received by him, that when he received an order it was for a station, but the name of the shipper was never disclosed to him. He testified the custom was to distribute the cars as

equally as possible, filling the oldest orders first as far as practicable, and said while he knew nothing about Sauer & Son, demands for cars for the station of Dana were treated the same as demands for other stations. Witness said he knew nothing about how many cars were in other divisions than his, but that he was not given enough cars during the period mentioned to supply the demand on his division.

In rebuttal Charles B. Sauer testified that he started on a trip to the southwest, February 4, 1903, and travelled by way of appellant's road to Kansas City, thence to Newton, Kansas, and from thence to Houston, Texas. From the latter place he went to Beaumont and Port Arthur, Texas, over another line of railroad. He was accompanied by L. M. Kelly, and testified he saw in the yards of appellant at Kansas City in the neighborhood of one hundred empty Santa Fe box cars; also that along the road in many places at stations and on side tracks miles away from a station he saw cars, sometimes three or four and sometimes a dozen in a place; that he was only in Wichita a few minutes, but while there saw in the yards in his judgment seventy-five cars of appellant's standing idle with open doors; that from Wichita south down into Texas he saw a great many cars of appellant's standing on side tracks and not in use. Kelly testified he was not taking particular notice of appellant's cars, but says he saw at least fifty in the yards at Kansas City and saw some at other places, but could not state where nor how many. Unquestionably appellant's contention that it was not bound to provide cars in advance for an unusual, unexpected and unprecedented demand, nor in anticipation of some extraordinary occurrence beyond the control of the railroad company which would temporarily prevent the rapid use and handling of all its cars, is sustained by the weight of authority. Mich. Cent. R. R. Co. v. Burrows, 33 Mich. 6, Ballentine v. N. M. R. R. Co., 40 Mo. 491, L. & N. R. R. Co. v.

Queen City Coal Co., 99 Ky. 217. But a railroad corporation owes the public the duty of providing adequate facilities for the transportation of such commodities as it is engaged in handling, and these facilities must be sufficient to take care of the business that is usually and ordinarily done along the line of the road.

In the Ballentine case, *supra*, it was said the measure of the railroad corporation's obligation is to provide sufficient equipment to take care of the business ordinarily done by the road, but, "This duty to the public must be performed in good faith, and without partiality or favor to any one. * * * As to whether the failure of defendant to receive and ship plaintiff's hogs in their proper order and within a reasonable time, was a wilful neglect or refusal to perform its duty, was a question of fact to be considered by the jury."

The burden was on appellant to prove its plea, and we are not prepared to say its proof in support of the plea was of such a character that the jury was bound to find it had proven its defense by the preponderance of the evidence. The value of its evidence in a large part depended upon whether subordinates made truthful reports to their superiors and obeyed their orders and the usual rules and methods of doing business. As to the real facts and truth in relation to these matters the witnesses who testified knew little or nothing. The testimony of appellant lacked positiveness and directness, was in many respects of the most general character and was not from witnesses who knew or claimed to know the truth about which they testified to. These things considered in connection with the rebuttal testimony offered by appellees (which we think was competent) in our opinion justified the jury in finding appellant had not proven its plea by the weight of the evidence.

It is further claimed by appellant that the proof

does not show "that any grain had been ready or offered for transportation at any station or stopping place established for receiving freights," the contention being that grain in the elevator situated upon appellant's side track was not an offer of shipment at the station. The proof shows the elevator was in such close proximity to the side track that grain was loaded from it in cars standing on the track, that the cars that were delivered to appellees by appellant were delivered at the elevator, and there is no intimation in this record that appellant at any time objected to delivering cars at the elevator, or that its failure or refusal to furnish them was because appellees did not offer their grain at the station instead of at the elevator on the side track, where the evidence shows appellant was accustomed to receive the grain.

During the argument of one of appellees' counsel, he told the jury they knew there was a combination of the transcontinental railroads, formed in the interest of the beef trust for the purpose of preventing grain from going into markets in large quantities. Counsel for appellant remarked: "I except to that as improper and not based on any testimony in the case," whereupon the court said: "I do not think there is any evidence justifying that argument."

At the conclusion of the trial, the court, on motion of defendant, also gave the jury the following instruction: "The jury is instructed that you should pay no attention whatever to any statements of counsel which are not founded upon the evidence before you, and in this connection you are instructed that there is no evidence in this case showing or tending to show any combination between the defendant railway company and any other railway company for any unlawful or improper purpose whatever."

It is claimed that notwithstanding the court's actions, the harmful effects of counsel's statements could not be removed from the minds of the jury.

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The remarks of counsel complained of were highly improper and should not have been made, but the amount of the verdict we think makes it clear that whatever effect such remarks might be expected to produce in the minds of the jury, the prompt statement by the court in the presence of the jury that there was no evidence justifying such argument, and the instruction given at the close of the trial, counteracted the bad effect such remarks might otherwise have produced. The verdict was for substantially double the damages proven, whereas the statute authorized a recovery of treble the actual damages. Under such circumstances it cannot be said that the verdict was the product of inflamed minds or the result of passion and prejudice.

The views we have herein expressed and the conclusions we have reached we think render unnecessary a discussion of the court's rulings in giving and refusing instructions, or of the other errors assigned. Believing there is no error in this record that would justify a reversal, the judgment is affirmed.

Affirmed.

Abraham Jacobson v. W. T. Jones.

Gen. No. 4,597.

1. ATTORNEY AND CLIENT—*what does not justify retention of fund collected by former for latter.* An attorney is not justified in refusing to turn over to his client money collected for him by reason of claims thereto being made by third parties, which such claims have not by such third parties been sought to be enforced by litigation.

Action of assumpsit. Appeal from the County Court of Peoria county; the Hon. WILBERT I. SLEMMONS, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed June 1, 1906.

JACOBSON & STULTZ, for appellant.

WOLFENBARGER & MAY, for appellee

MR. PRESIDING JUSTICE VICKERS delivered the opinion of the court.

Appellee made an arrangement with appellant, an attorney at law, to collect for him, appellee, a sum of money from an estate, and received from appellant the following receipt:

“Received of W. T. Jones, one Release for \$188.08 ———Dollars, which amount, less \$5 for Atty. fees, is to be paid to W. T. Jones in Isaac Coriell, dec’d estate, Warren Co., New Jersey.

A. JACOBSON, Atty.”

Appellant collected the money, but refused to pay any of it to appellee, whereupon suit was brought.

Upon the trial appellant asked leave to introduce evidence tending to show that appellee had by misrepresentation and fraud obtained an assignment of the claim which he, appellant, had collected and received \$188.08 upon. Appellant did not claim that he had paid over any of the money by him collected, or had any right thereto, but insisted that certain persons had notified him that appellee had no right to the money and asked him, appellant, not to pay the same to appellee. This evidence the court refused to admit. The defense attempted to be set up by appellant was baseless. If the money received by appellant under his employment as an attorney belongs to other parties, it is for them to proceed against appellee, and it is not for appellant, who, under his employment as an attorney, has collected this money, to refuse to pay it over to his client. Appellant made no pretense that as between him and appellee he ought not to pay over this money. He endeavored to set up an alleged fraud perpetrated by appellee upon persons in no way or wise parties to the transaction between appellant and appellee, and who are not parties to this suit.

The judgment of the County Court is affirmed.

Affirmed.

Herman W. Danforth, Assignee, v. H. C. Stone, Administrator.**Gen. No. 4,600.**

1. **ASSIGNEE**—*nature of office of, under Voluntary Assignment Act.* An assignee under the act of this state concerning "voluntary assignments for benefit of creditors" is, in effect, a statutory receiver, that is, he receives and holds in trust the property of the assignor under the conditions, with the powers and duties possessed under the common law by receivers, modified and controlled by the provisions of such act.

2. **ASSIGNEE**—*right of, to recover trust fund from deceased assignee.* An assignee appointed upon the death of the original assignee is entitled to recover from the estate of such deceased assignee any funds in his possession belonging to the insolvent estate which had not been disbursed by such deceased assignee or allowed to him by way of compensation for services rendered.

3. **INSOLVENT ESTATE**—*effect of allowance of claim against.* The allowance of a claim against an insolvent estate and an order to pay the same is not a satisfaction thereof, nor is any portion of the trust fund, by an order to pay a claim, segregated from the remainder of the fund or taken out of the trust.

Contested claim in court of probate. Appeal from the Circuit Court of Peoria county; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed June 1, 1906.

PAGE, WEAD & HUNTER, for appellant.

J. A. WEIL and F. H. TICHENOR, for appellee.

MR. PRESIDING JUSTICE VICKERS delivered the opinion of the court.

On the 30th of December, 1892, Kirkwood, Miller & Company made an assignment for the benefit of creditors. Isaac C. Edwards was appointed assignee and continued to serve as such until June 28, 1902, when he died. As a consequence of the assignment, there arose considerable litigation, reports of which appear in the case of J. I. Case Plow Works v. Edwards, 71 Ill. App. 655, and the same suit in 176 Ill. 39.

February 19, 1900, Edwards, assignee as aforesaid, made a report in which he charged himself with receipts, \$25,690.45, crediting himself with payments to the amount of \$8,676.73, and stating a balance on hand of \$17,013.72. The assignee further reported "that he had in his hands to pay out upon a dividend of two and one half per cent. \$1,500, the greater portion of which had not been called for, and a small portion of which was claimed by different parties." The court confirmed said report.

At the May term, 1900, the report of the assignee was approved, and he was ordered to pay within thirty days to the J. I. Case Plow Works the sum of \$2,700 for its expenses and attorney's fees; to McCullough & McCullough, \$300; to George B. Foster, \$4,885; and the order provided that he be allowed to retain as his compensation for services as assignee \$6,500.

After the death June 28, 1902, of said Edwards, assignee, Herman W. Danforth, the appellant, was appointed his successor and he filed a claim in the Probate Court of Peoria County against the estate of Edwards for \$17,013.72. The County Court allowed the claim of Danforth for \$12,917.84, which appears to be the whole amount of the claim made by Danforth, with interest thereon, less \$6,500 theretofore allowed by the County Court as compensation to Edwards for his services as trustee.

From such order of the Probate Court an appeal was prosecuted by the administrator of Edwards' estate to the Circuit Court of Peoria County, which court allowed the claim of Danforth for the sum of \$1,412.31. The Circuit Court held as a proposition of law the following:

"That the present assignee is entitled to recover against the estate of Edwards the full amount of assets and funds which the report of said Edwards introduced in evidence shows he had in his hands

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belonging to said estate at the time of making said report, less any sum shown by the evidence to have been paid over by him or by his estate pursuant to and in conformity with the orders of the County Court made in said assignment matter, *and less such sums as by his report and the order of the court have been allowed and appointed to creditors and are now subject to their order.*"

The Circuit Court proceeded upon the theory that the order of the County Court made in the insolvency proceedings at the May term, 1900, allowing to three parties for attorney's fees and expenses of administration \$7,885 and ordering assignee Edwards to pay such amount to said several parties within thirty days from the date of said order, was in effect a separating of the amounts so ordered to be paid, from the trust fund, and that the said sum of \$7,885 became by such order a debt due to the said three claimants and ceased to be a portion of the trust fund.

Section 12 of the Statute concerning "Voluntary Assignment for Benefit of Creditors," provides:

"That in case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment to file an inventory and valuation, and give bonds as required by this act, it shall be the duty of the county judge of the county, where such assignment may be recorded, on the application of any person interested as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment; and such person or persons on giving bond with sureties as required above of the assignee or assignees named in such assignment, shall possess all the powers thereby and by this act conferred upon such assignee or assignees, and shall be subject to all the duties hereby imposed as fully as though he or they are named in the assign-

ment, and in case any security shall be discovered to be insufficient, or on complaint before the county court it shall be made to appear that any assignee or assignees are guilty of wasting or misapplying the trust estate, said county court may direct and require the giving of additional security, and may remove such assignee or assignees, and may appoint others in their stead to fulfill the duties of said trust; and such persons so appointed on giving bond shall have full power to execute such duties, and to demand and sue for all estate in the hands of the person or persons removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied, which he or they may neglect or refuse to make satisfaction for, from such person or persons, and his or their sureties."

An assignee under the act of this state concerning "Voluntary Assignments for Benefit of Creditors," is, in effect, a statutory receiver; that is, he receives and holds in trust the property of the assignor under the conditions, with the powers and duties possessed under the common law by receivers, modified and controlled by the provisions of the statute.

"As a general rule, actions against a receiver are in law actions against the receivership; his liabilities are official, not personal; and judgment against him should be so entered as to be enforced only out of the funds properly chargeable to him in his capacity of receiver, leaving the manner of enforcement to be determined by the court having jurisdiction of the receivership. And an action may be brought against a receiver on a liability incurred by his predecessor in the receivership, since the receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes; the position of the receiver in this respect being somewhat analogous to that of a corporation sole." Pomeroy's Equitable

Remedies, vol. 1, sec. 179; McNulta, Receiver, v. Lochridge, Administrator, 141 U. S. 332.

Our statute, before set forth, gives to the assignee appointed upon the death of any previous assignee, all the powers conferred by the statute and by the appointment made in pursuance of the statute. The right to the estate held by Edwards, as assignee, upon the appointment of Danforth passed to the latter. The claims mentioned, allowed against the estate while Edwards was the assignee thereof, were not paid by him; the fund out of which they should have been and were to be paid was held in trust by Edwards up to his death. Danforth by order of court succeeded to such trust. Had Edwards not died, but been removed by order of court, it is clear it would have been his duty upon such removal to have transferred the entire fund in his hands to the new assignee, Danforth, and he could have been compelled so to do by way of proceedings for contempt. Danforth being clothed with the trust, it became and is his duty to pay the claims heretofore mentioned in so far as he has funds in his hands with which to do so; in other words to the extent of the trust funds in his hands to comply with all the orders made by the court during the assigneeship of his predecessor, Edwards, as well as those that may be made during his administration. The allowance of a claim by the court and an order to pay the same is not a satisfaction thereof, nor is any portion of the trust fund, by an order to pay a claim, segregated from the remainder of the fund, or taken out of the trust. The present assignee has a just and valid claim against the administrator of the former assignee for all of the trust fund in his hands at the time of his death. To the amount thereof the appellant was, in the suit against the administrator of Edwards, entitled to a judgment.

The course of the former trials and of the argument here requires a few further suggestions. So far

as appears here, no appeal was prosecuted from the order of the County Court above referred to. Its validity or propriety could not be questioned on the trial of this claim in the Probate Court or on appeal in the Circuit Court. The succeeding assignee therefore cannot recover the \$6,500 allowed to Edwards for his services as assignee, nor litigate in this cause the propriety of that allowance. Edwards had in his hands a portion of a former dividend not paid, part of it because it had not been called for and part of it because of disputes as to the parties entitled to receive it. The succeeding assignee is entitled to these funds in order to make distribution of them. If distribution cannot be made, the unclaimed portion does not belong to the assignee as his private property, but should be turned over to his successor, and ultimately is payable to the county treasurer under section 16 of the assignment act. There is proof tending to show that the assignee settled with certain creditors for less than the dividend due them, though he took receipts for the full amount due. In such case the assignee and his estate should only be credited with the amount the assignee actually paid. The Circuit Court should classify the claim. The judgment of the Circuit Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.

Melvin E. Woolf v. Cornelia E. Sullivan et al.

Gen. No. 4,604.

1. **REAL ESTATE BROKER**—*when not entitled to commissions.* A real estate broker is entitled to no commission where he is not faithful to his trust, as in this case, where it appeared that he not only did not procure the purchaser seeking to buy the property,

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but did, in fact, prevent the consummation of the sale to such proposed purchaser.

Bill to remove cloud. Appeal from the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed June 1, 1906.

HOPKINS, PEFFERS & HOPKINS, for appellant.

JOHN M. RAYMOND and JOHN K. NEWHALL, for appellees.

MR. PRESIDING JUSTICE VICKERS delivered the opinion of the court.

Appellee being the owner of a farm containing 160 acres sent her son William to appellant, a real estate agent, to list the farm with him for sale. Appellant, Woolf, drew up an instrument which not only gave to him the exclusive right to sell the farm, but also the right for at least twelve months from the date of the contract to sell or purchase the farm at the price of \$125 per acre, he to receive a commission of two per cent. The instrument also provided that it should remain in force and effect until after the expiration of twelve months, if not terminated by written notice to appellant. This instrument was signed "C. E. Sullivan, per W. S." It does not appear that Mrs. Sullivan authorized the making of or ratified this instrument or knew what its contents were; although she did know that, as directed by her, her son had listed the farm with Woolf for sale. The instrument also provided that appellant should retain all money for which the property should be sold over and above the list price of \$20,000.

Some nine or ten months thereafter, appellant procured an intended purchaser who proved to be unable to make the cash payments, and the negotiations with him fell through.

In the proceedings under the bill filed by appellee, Woolf claimed that he entered into negotiations to

sell the farm to Messrs. Aucutt & Keck, upon terms that would net Mrs. Sullivan \$125 per acre, less two per cent. commission, and informed Mrs. Sullivan thereof; that thereafter she, without his knowledge or consent, made a written contract to sell the farm to Aucutt & Keck for the sum of \$22,500 and that thereupon \$1,000 was deposited by them in bank to bind the bargain.

Upon the trial it appeared that appellant, having learned that Mrs. Sullivan had made a contract with Aucutt & Keck to sell the farm to them for \$22,500, attached to the instrument signed "C. E. Sullivan, per W. S.," an affidavit of its execution and filed the same for record. In accordance with the agreement Mrs. Sullivan had made with Aucutt & Keck, she had prepared an abstract of title to the farm, upon which appeared the instrument, before mentioned, which Woolf had caused to be recorded. Aucutt & Keck had previously had conversation with Woolf with reference to the purchase of the farm. At this time Woolf offered to sell them the property for \$30,000. After this the contract before mentioned was made by Aucutt & Keck with Mrs. Sullivan. Having discovered the recorded contract, Aucutt & Keck saw Woolf and endeavored to induce him to release the cloud upon the title caused by the recording of the instrument given to him by Mrs. Sullivan's son, William. Woolf offered to release his claim, or, as the witness Aucutt testified "that cloud" for the difference between \$22,500 and \$30,000. Aucutt & Keck refused to give this, or to go on with the contract they had made with Mrs. Sullivan, and it was surrendered because, as Aucutt testified, "when we found we could not consummate the deal, we released the contract. I took back the thousand dollars."

Thereupon Mrs. Sullivan filed her bill against Woolf, to remove the cloud caused by the filing of the instrument he had recorded. Woolf answered the bill

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setting up the instrument heretofore mentioned signed "C. E. Sullivan, per W. S.," as a contract by her made, giving to him the right to sell or buy the property for the sum of \$20,000 cash, and further setting up that on the 7th day of November, 1902, "and while the said contract was in full force and effect, he applied to the said Cornelia E. Sullivan, and offered to pay her the sum of twenty thousand dollars, being the purchase price of the said land according to the said agreement, upon her delivering to this defendant a sufficient warranty deed for the said premises, according to the said agreement."

Woolf also, June 17, 1904, filed a cross-bill setting up the said instrument as the contract of appellee, and offering to pay her the purchase price of \$20,000 mentioned therein, and praying that she be required to make a deed of the premises to him. Upon the hearing, the court rendered a decree finding the instrument heretofore mentioned to be a cloud upon the title of appellee, and ordered that the same be cancelled. The court further ordered that the cross-bill of appellant be dismissed at his cost. From this decree appellant has appealed, claiming in this court that he is entitled to the sum of \$2,900, made up of \$2,500, the sum in excess of \$20,000 for which Mrs. Sullivan could have sold the farm to Aucutt & Keck, and 2 per cent upon \$20,000, making in all \$2,900, which appellant insists he is entitled to receive under the instrument signed "C. E. Sullivan, per W. S."

William Sullivan had no authority from his mother, appellee, to sign her name to the instrument under which the claim of appellant is made. He did have authority to employ appellant to sell the farm. Had appellant been the efficient cause of procuring the offer made by Aucutt & Keck, he would have been entitled to the reasonable and customary commissions for such service; but having been employed by Mrs. Sullivan to sell her farm, he could not, without violating

his duty to her, do anything to prevent the sale of the farm by her, being, as heretofore said, entitled so long as his agency existed, to commissions on any sale which she made, of which he was the effective cause. Instead of being faithful to his agency, he, as he had no right to do, recorded an instrument which clouded her title and prevented her making a sale, as she had arranged, to Aucutt & Keck. Such being the case, he is not entitled to commissions for a sale which he not only did not bring about, but prevented.

The decree of the Circuit Court is affirmed.

Affirmed.

Knickerbocker Ice Company v. Oliver K. Leyda.

Gen. No. 4,582.

1. *ORDINANCE—when violation of, precludes right to recover for personal injuries.* Where the injury in question was proximately contributed to and caused by the plaintiff's violation of an ordinance, his right to recover is thereby foreclosed.

2. *ORDINANCE—when plaintiff's violation of, does not preclude recovery for personal injuries.* The right of a plaintiff to recover for personal injuries is not foreclosed because of the fact that at the time of the injury in question he was violating a municipal ordinance, if it appears that permission so to do had been granted him by the proper authorities.

3. *MEASURE OF DAMAGES—when instruction as to, in personal injury case, erroneous.* An instruction upon this subject is erroneous which is calculated to create in the minds of the jury the belief that it was their duty, in case they found for the plaintiff, to fix the damages at the highest possible amount the evidence would justify.

4. *MEASURE OF DAMAGES—when instruction as to, in personal injury case, erroneous.* A plaintiff in an action for personal injuries is not entitled to recover damages for future mental pain or suffering unaccompanied by physical pain or suffering, and an instruction which tells the jury to give damages for future mental or physical suffering is erroneous where it is not predicated upon some evidence of possible future suffering.

5. *NEGLIGENCE—what not such as to justify a recovery for personal injuries.* The slightest want of care upon the part of a de-

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fendant is not sufficient to justify a verdict in a personal injury suit; it is only the failure to exercise ordinary care which will sustain such a verdict.

Action on the case for personal injuries. Appeal from the City Court of Aurora; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed June 1, 1906.

W. H. CARD and AMOS C. MILLER, for appellant.

WHEELER, SILBER & ISAACS and MURPHY & ALSCHULER, for appellee.

MR. PRESIDING JUSTICE VICKERS delivered the opinion of the court.

Plaintiff was injured while working under the Lake Shore and Rock Island viaduct, which is at the crossing of Fifty-first street, in the city of Chicago. Plaintiff when injured was with his associates engaged in painting the under side of this viaduct. At this place the street was depressed slightly for some distance before it reached the beginning of the viaduct. This depression amounted to two feet in one hundred. Before the street reached the viaduct it became level and passed under the viaduct as a level street, until, on the other side and some distance beyond it, the grade was raised two per cent. to meet the street beyond. The plaintiff was standing upon planks which hung under a part of the under side of the viaduct and was painting about sixteen feet in from the east end. The driver of defendant's wagon came from the east in the north street railway tracks, which run under the viaduct, and when about forty feet away from where plaintiff was working, plaintiff saw him, waved to him to turn out, and called to him. The driver pulled back his horses and stopped. Plaintiff claimed that he motioned for him to turn out and, thinking he was going to do so, turned and went on painting. The driver, instead of turning out, drove along to the

planks and attempted to pass under them. A crowbar projecting up from his wagon struck the plank on which plaintiff was working, throwing plaintiff on his head and shoulders to the stone pavement, causing the injuries complained of. It appeared that when a street car passed underneath the viaduct, the planks were moved back so that the street car could pass, but that this took three or four minutes. There is a conflict in the testimony as to the warning which plaintiff gave the driver. Three witnesses testify that he called and waved to the driver; the driver testified that no one called to him until he got right under the scaffold when some one, he does not know who, said "All right." Plaintiff testifies that he was not watching the wagon and driver after he waved and called, believing that the latter intended to drive out, as other wagons had done. Plaintiff received a wound on his scalp which extended down his forehead to a point an inch and a half over his left eye. He was for some time out of work on account of his injuries, was operated upon in hospital and bears a slight scar on his forehead and scalp. The plaintiff proved an actual money loss of about \$125. The defendant filed a plea of general issue and during the trial asked leave to file additional pleas, setting up ordinances of the city of Chicago, which defendant claimed plaintiff was violating at the time of the accident. The court permitted these special pleas to be filed and required plaintiff to plead to them *instanter*. Plaintiff filed an oral demurrer which was overruled, and the court denied plaintiff's application for leave to file replications, general and special.

The jury returned a verdict of \$750 for plaintiff, upon which there was judgment, and defendant appeals.

The defendant filed in court a motion to dismiss the suit on the ground that the cause of action did not arise within the city of Aurora and that therefore the

Knickerbocker Ice Co. v. Leyda.

City Court of Aurora had not jurisdiction of the subject-matter of the suit. If the court did not have jurisdiction of the subject-matter of the suit the judgment entered by it is a nullity and should be reversed without remanding the cause. Want of jurisdiction over the person may be waived, but lack of jurisdiction over the subject-matter cannot be waived and is fatal to the validity of the judgment even on appeal. We are of opinion that the City Court of Aurora did have jurisdiction of the subject-matter and that the motion to dismiss was properly denied. *Hercules Iron Works v. Elgin, Joliet and Eastern Ry. Co.*, 141 Ill. 491.

The defendant introduced in evidence the following ordinances of the city of Chicago:

“1867. *Streets, Alleys, etc., to be kept clear.* The streets, alleys and sidewalks in the city of Chicago, shall be kept free and clear of all obstructions, incumbrances and encroachments for the use of the public, and shall not be used or occupied in any other way than is herein provided.”

“1881. *Incumbrances or Obstructions.* Any person, company or corporation who shall incumber or obstruct, or cause to be incumbered or obstructed any street, alley, public landing, wharf or pier, or other public place in said city, by placing therein or thereon any building materials or any article or thing whatsoever, without having first obtained written permission from the commissioner of public works, shall be subject to a penalty of not less than five dollars nor more than fifty dollars for each offense, and a further penalty of ten dollars for each day or part of a day such incumbrance or obstruction shall continue.”

“1898. *Who Liable for Damages.* In all cases when any person or persons shall perform any of the work mentioned in the preceding sections, either under contracts with the corporation or by virtue of permission obtained from the mayor and city council, or either of the departments, such persons shall be answerable for any and every damage which may be occasioned to

persons, animals or property, by reason of carelessness in any manner connected with the said work.”

“1901. *General Penalty.* Any person who shall violate, neglect or refuse to observe any of the provisions of this article, when no other or different penalty is provided, shall be fined, on conviction, not less than five dollars nor more than twenty dollars.”

It is manifest that the accident would not have happened had not the plaintiff been at the time violating ordinances of the city of Chicago, and that such violation contributed directly and proximately to cause the injury which he received. In reply to this it is to be said that it may be the case that permission to occupy the street with a platform in the manner the plaintiff was doing at the time of the injury had been given by the commissioner of public works. The plaintiff should have been permitted to show, if he could, that such permission had been given.

The Supreme Court of Massachusetts, in the case of *Newcomb v. Boston Protective Department*, 146 Mass. 596, on page 602 said: “No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. *Hall v. Ripley*, 119 Mass. 135; *Banks v. Highland Street Railway*, 136 Mass. 485; *Tuttle v. Lawrence*, 119 Mass. 276, 278; *Lyons v. Desotelle*, 124 Mass. 387; *Heland v. Lowell*, 3 Allen, 407; *Steele v. Burkhardt*, 104 Mass. 59; *Damon v. Scituate*, 119 Mass. 66; *Marble v. Ross*, 124 Mass. 44; *Smith v. Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff’s unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim. *Hall v. Corcoran*, 107 Mass. 251.”

At the instance of plaintiff the following instructions were given:

"If you find a verdict for the plaintiff, you should award him full compensation for the injuries he has sustained, and in arriving at the amount of such compensation you are not restricted to the mere loss of time by the plaintiff, but you may allow such damages as will compensate him for the physical and mental pain and suffering, if any, which the evidence shows that he has sustained or will sustain in the future, by reason of the injuries, if any, which he received."

"The court instructs you, that it was the duty of defendant's driver to use ordinary care in driving his wagon, even as against a person who may have been violating a city ordinance, and if you find, from the evidence, that the injuries of the plaintiff were caused by want of care on the part of the defendant's driver, and not by his own negligence, then your verdict must be for the plaintiff."

The jury should not have been instructed that if they found for the plaintiff they should award him full compensation for the injuries he had sustained. As is said by the Supreme Court in the City of Peoria, et al., v. Robert Simpson, 110 Ill. 294-304: "The language in which this instruction is expressed is well calculated to create in the minds of the jury the belief it was their duty, in case they found for plaintiff, to fix the damages at the highest possible amount the evidence would justify."

Nor should the jury have been instructed that they might allow the plaintiff such damages as would compensate him for the physical and mental pain and suffering, "if any, which the evidence shows that he has sustained or will sustain in the future by reason of the injuries, if any, which he received." There was no evidence that the plaintiff had suffered any mental pain, unless an inference might be drawn that he was annoyed or humiliated by the very slight disfigurement caused by the injury. Nor was there any evidence tending to show that he was likely, as a result

of the injury, to in the future sustain any physical pain or suffering. Nor do we think the plaintiff is entitled to recover for future mental pain or suffering, unaccompanied by physical pain or suffering.

Nor should the second of the above instructions have been given. While it is quite true that it was the duty of the defendant's driver to use ordinary care in driving his wagon, even as against a person who may have been violating a city ordinance, nevertheless it is not the case that if the injuries of the plaintiff were caused by want of care on the part of the defendant's driver and not by his own negligence, the verdict must be for the plaintiff. It is not the case, as the jury might infer from this instruction, that if the injuries of the plaintiff were caused by the *slightest* want of care on the part of defendant's driver and not by the plaintiff's negligence, the verdict must be for the plaintiff.

"Negligence is the opposite of care and prudence; is an omission to use the means reasonably necessary to avoid injury to others." Putney v. Keith, 98 Ill. App. 285-288.

"Ordinary care is consistent with slight negligence, except in instances such as the work of common carriers of passengers, in which the law imposes extraordinary diligence; whoever exercises ordinary care in the conduct of his affairs not to injure others, is not responsible for hurts that come from acts performed with such care." Putney v. Keith, 98 Ill. App. 285-289.

The defendant's wagon was lawfully upon the street and, while proceeding in a lawful manner, the defendant was bound, as respects the plaintiff, to exercise only reasonable and ordinary care to avoid injury to him. Vol. 21, p. 462, Am. & Eng. Ency. of Law, 2nd ed.

The judgment of the City Court of Aurora is reversed and the cause remanded.

Reversed and remanded.

Fraser v. Fraser.

William Fraser et al. v. Grace Fraser et al.**Gen. No. 4,824.**

1. JUDICIAL SALE—*what bill seeking to set aside, should contain.* A bill to relieve against a judicial sale should contain an offer to put the defendants *in statu quo*.

2. JUDICIAL SALE—*what does not justify setting aside.* The courts will not relieve against a judicial sale because of a mistake of law, as, in this case, following the advice of counsel which was afterwards found to be predicated upon a mistaken view of the law; some fraud, undue influence or imposition must be shown.

Bill in equity. Error to the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed July 17, 1906.

CHARLES CARROLL BARTLETT and SAMUEL C. IRVING,
for plaintiffs in error.

FISHER & MANN, for defendants in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This writ of error brings before us a decree for complainant in a suit in equity brought by Grace Fraser to relieve her from a purchase at a judicial sale. A former writ of error was dismissed for lack of proper parties. The facts are outlined in our former opinion in *Fraser v. Fraser*, 110 Ill. App. 619, to which we here refer to avoid repetition. There are two reasons why the bill did not make a case entitling complainant to relief.

1. Complainant did not offer to put the parties *in statu quo*, and it is manifest that they cannot be so placed. The bill shows that when the decree of foreclosure was entered on November 24, 1896, it was thereby established that Sadler owed the estate upon the mortgage debt \$24,380.34 and that by the original

sale to complainant \$23,896 of that indebtedness (less the costs) was extinguished. By the decree in the present suit complainant has been relieved of that purchase, and by the subsequent sale to her thereunder and its approval the amount realized by the estate has been reduced to \$10,600 less the costs. Omitting reference to the costs, by this reduction the estate has been deprived of \$13,296. If the original sale had been for only \$10,600 the estate would have been entitled to a deficiency decree against Sadler for that difference, and it is not alleged that such a decree could not then or since then have been collected. If collected, one-half that sum would have gone to the legatees other than Mrs. Fraser. This decree makes no provision for restoring that liability of Sadler. He is not made a party to this suit, and if he were, there are no allegations which would reimpose upon him the liability from which he was relieved by the original sale and its approval. This is a loss to the estate and to the legatees for which Mrs. Fraser provides no remedy. Moreover the avowed object of Mrs. Fraser in bidding so high at the first sale was to prevent the respective owners of one or more lots from redeeming, and in that purpose she succeeded. At the sale under the present bill she bought in the property for less than one-half her original bid. If she had originally bid as low as she did at the second sale it may be these owners of lots could and would have redeemed. She did not make these owners parties to this suit nor give them an opportunity to redeem. If she had restored the subdivision which she vacated after her first purchase, and had made Sadler and the various lot owners parties to this suit, as she did to the original foreclosure suit, and thus given them an opportunity to be restored to their former position, it may be that the property would have sold for more at the second sale. The course here pursued of setting aside the sale by which these parties lost their title, and yet

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omitting to make them parties to the suit, was calculated to cast a cloud upon the title which would be obtained at the second sale, and thereby to deter bidders from offering the full value of the property, and this would injure the legatees. In our judgment these features of the case are sufficient to deprive complainant of the relief she seeks by this bill, even if but for them she would be entitled to be relieved from her purchase.

2. The mistake was one of law and not of fact. The allegation is that her attorney gave her erroneous advice as to her legal rights, and that she acted upon that advice and bid double what the lots were then worth. No fraud, undue influence or imposition is charged. She was not led into the error by any action or representation of any party to this suit. She blames no one but her own attorney. The substance of the charge is that her attorney in advising her failed to consider how her renunciation of her husband's will would be affected by section 12 of the Dower Act. Equity does not grant relief against the consequences of a mere mistake of law. The rule is thus stated in *Dinwiddie v. Self*, 145 Ill. 290: "The general rule is, that a mistake of law, pure and simple, is not adequate ground for relief. Where a party, with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not in general relieve him from the consequences of his mistake." The Illinois cases are collected and discussed in *Fowler v. Black*, 136 Ill. 363, and *Atherton v. Roche*, 192 Ill. 252. The same doctrine is thus announced by the Supreme Court of the United States in *Utermehle v. Norment*, 197 U. S. 40: "It has been held from the earliest days, in both the federal and state courts, that a mistake of law,

pure and simple, without the addition of any circumstances of fraud or misrepresentation constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake." Other authorities are there collected. In *Cooper v. Crosby*, 3 Gilm. 506, the court refused to relieve against a misunderstanding of the advice of counsel. In *Fuller v. Little*, 69 Ill. 229, and *Love v. Wilson*, 81 Ill. 529, it was held that equity will not relieve against the neglect or mistake of counsel. In *Williams v. Thwing Electric Co.*, 160 Ill. 526, ignorance of a statute seems to have been the ground upon which equity was asked to give relief, but it was refused. We have not access to *Hamblin v. Bishop*, 41 Fed. 74, but as quoted to us we think it much in point. It is obvious that to permit the acts and liabilities of a party to be set aside because he claims he made a mistake as to the law, will open the door to much dangerous and embarrassing litigation, against which very danger the maxims of the law were erected, that ignorance of the law excuses no one, and that every one of sound and mature mind is bound at his peril to take knowledge of the law, both common and statute law. As said in 2 Pomeroy's Eq. Juris., sec. 842: "If ignorance of the law were generally allowed to be pleaded there could be no security in legal rights, no certainty in judicial investigation, no finality in litigations." That author states exceptions to this rule, such as a mistake arising from the inequitable conduct of the other party, or from fraud, concealment, misrepresentation, undue influence, violation of confidence and the like, but those exceptions have no application to the case made by the present bill. We are therefore of opinion that on this ground also complainant has not stated a case against which equity will afford relief.

The decree will be reversed, and the cause will be remanded to the court below with directions to vacate

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the orders approving the master's sale and distribution under said decree, and to dismiss the bill for want of equity.

Reversed and remanded with directions.

Mr. Justice WILLIS took no part in the consideration of this case.

**City of Aurora et al. v. Elgin, Aurora & Southern
Traction Company et al.**

Gen. No. 4,617.

1. RAILROAD COMPANIES—*act authorizing making of operative contracts and permitting the borrowing of money construed.* The act of February 12, 1855, entitled "An act to enable railroad companies to enter into operative contracts and to borrow money" applies to street railway companies as well as to ordinary commercial railroads.

2. CHARTER—*what forms part of, granted to street railway company.* Statutes in force at the time of the grant of a franchise to a street railway company form a part of such franchise, and, as the case may be, confer rights or impose liabilities.

3. CHARTER—*when municipality estopped to deny right to operate under assignment of.* A municipality is estopped to deny the right of the assignee of a franchise to operate thereunder where it for years has permitted such operation without objection and has allowed the assignee to build, develop and improve such line.

4. TRACTION COMPANY—*what not within charter rights of.* The transportation of merchandise is the proper business of a commercial railroad and is not within the ordinary charter rights of a traction company.

5. TRACTION COMPANY—*how municipality must exercise power to regulate operation of.* A municipality has no power by mere resolution to regulate the mode and manner of operation of a traction company; the exercise of such a power by a municipality must be by ordinance.

Bill for injunction. Appeal from the Circuit Court of Kane county; the Hon. LINUS C. RUTH, Judge, presiding. Heard in this court at the October term, 1905. Reversed in part and affirmed in part. Opinion filed July 17, 1906.

E. M. MANGAN and MURPHY & ALSCHULER, for appellants; CHARLES F. CLYNE, of counsel.

HOPKINS, PEFFERS & HOPKINS, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The Elgin, Aurora and Southern Traction Company is a street and interurban railway company organized under the Horse and Dummy Act, and will be called the Aurora company. The Joliet, Plainfield and Aurora Railroad Company is an interurban railway company organized under the general railroad law, and will be herein called the Joliet company. The Aurora company operates a street railway within the city limits of the city of Aurora, besides operating certain interurban lines. The Joliet company operates an interurban railway from the city limits of Joliet to the city limits of Aurora, at a point where a line of street railway of the Aurora company, commonly called the Fifth street line, passes a short distance outside the city limits of the city of Aurora to a city park. On August 5, 1904, the two companies entered into a written contract. It recited that the Aurora company owned and operated a line of railway within the city limits of Aurora, known as the Fifth street line, extending from the city park to the transfer station for interurban cars, on the east side of Fox river, and that the Joliet company owned a line of railroad from the city limits of Joliet, which was projected to connect with said Fifth street line just outside the city limits of Aurora; that the Joliet company was desirous that its passengers be carried from such point of connection into the city of Aurora by said Aurora company, and be taken to said point of connection by said Aurora company; that in order to avoid the transfer of passengers from the cars of the Joliet company to the cars of the Aurora company at the point of connection, it was mutually desirable

that the Aurora company lease the cars of the Joliet company, and thereby bring passengers to said point of connection, and take them therefrom; that the cars of the Joliet company were operated and controlled by the same motive power and were of the same general type and character as the cars of the Aurora company; and that it was mutually desirable that the Aurora company should carry to and from said point of connection, express, mail or other matter destined to or from points on the line of the Joliet company, so far as it was able to do under municipal or statutory ordinances and regulations. It was therefore agreed that the Aurora company, during its regular hours of operation, should carry all passengers of the Joliet company brought to said point of connection therefrom over its Fifth street line to said transfer station for interurban cars on the east side of Fox river, and from said transfer station to said connecting point, and also to carry, so far as it was able to do under municipal and statutory ordinances and regulations, express, mail or other matter destined to or from points on the railway of the Joliet company; and that the Joliet company thereby leased to the Aurora company the cars of the Joliet company necessary for such service, the lease to continue in force during the existence of the present ordinances, or renewals thereof, granting rights to said Aurora company to operate said Fifth street line; that the Aurora company should take the cars of the Joliet company at the point of connection, and use the same for said purpose, and the Joliet company should furnish the necessary employees to operate said cars from said point of connection to said transfer station and back again; and said employees, while operating said cars over the Aurora line, should be considered the employees of the Aurora company, and subject in all things to its regulation; but said employees should be paid by the Joliet company; that said cars, while on the tracks of the

Aurora company, should be considered as the cars of the Aurora company, and operated by it. The contract provided a compensation to the Aurora company for carrying such passengers and provided for the issue of transfers to passengers, if municipal authority should require it of the Aurora company; and provided how the Aurora company should be compensated for such transfers. It provided what compensation the Joliet company should pay to the Aurora company for carrying express, mail or other matter over said Fifth street line, and provided for the manner of keeping the joint accounts, and for making settlements, and for arbitrating differences. It required the Joliet company to hold the Aurora company harmless from all claims for damages or injuries of any kind occurring on the tracks of the Aurora company by means of the use of the cars of the Joliet company. It fixed the frequency with which the Joliet company should furnish service, and bound the Joliet company to pay one-third the expense of the maintenance of a combination express station and passenger depot in the city. When the line of the Joliet company was about completed to the point of connection, the city council passed a resolution directing the mayor to take such steps as might be necessary to prevent any railroad from using the public streets, without having first procured a license from the council; and the mayor thereupon addressed a letter to the Aurora company, notifying it of that action, and that it would not be permitted to operate the cars of the Joliet company over its lines, and that if it attempted to do so, the mayor would use such means as were at his command to prevent it.

Thereafter, on October 20, 1904, the Aurora company and the Joliet company filed a bill in equity to restrain the city of Aurora and its mayor and other officers, from interfering with them in operating the cars of the Joliet company over said Fifth street line

under said contract, and such an injunction was issued. After a demurrer to the bill and a motion to dissolve the injunction, neither of which seems to have been pressed, the defendants answered the bill. Complainants filed exceptions to various portions of the answer, which were argued and sustained. A replication was filed to the rest of the answer, and there was a hearing, and a decree for complainants, making the injunction perpetual. This is an appeal by defendants from said decree.

1. The first question is whether these two companies had power to enter into such an operating contract. The title, and sections 1 and 2 of the act of February 12, 1855, appearing as paragraphs 44 and 45 of Chapter 114 of Hurd's Revised Statutes, are as follows:

“An act to enable railroad companies to enter into operative contracts and to borrow money.

“Sec. 1. All railroad companies incorporated or organized under or which may be incorporated or organized under the authority of the laws of this State, shall have power to make such contracts and arrangements with each other and with railroad corporations of other states for leasing or running their roads, or any part thereof; and also to contract for and hold in fee simple or otherwise, lands or buildings in this or other states, for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act.

“Sec. 2. All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested in such connection.”

That this act applies to street railway companies as well as to ordinary commercial railroads is settled by *City of Chicago v. Evans*, 24 Ill. 52; *Illinois Midland Railway Co. v. People*, 84 Ill. 426; and *Archer v.*

T. H. & I. R. R. Co., 102.Ill. 493; and this was recognized as the law in *Lieberman v. C. R. T. Co.* 141 Ill. 140. The case of the *City of Chicago v. Evans*, *supra*, shows the limitations under which that statute is applied to a case like the one before us. It is there held that while roads employing the same propelling power and created for the same purposes may so connect under the act above quoted, yet no such company acquired new or greater powers or privileges by virtue of such connection, and that the provisions of the charter of the company whose road is being so used must govern the performance of the contract upon its line. In other words, as applied to this case, the Joliet company, when its cars pass upon the Fifth street line, does not carry upon that line its charter and privileges, but this contract can be carried out only so far as the charter of the Aurora company permits it to be done. In fact, the contract provides that when the Joliet cars are on the Aurora line they shall be considered as the cars of the Aurora company, and complainants are asserting the validity of that contract. The charter of the Aurora company authorizes the carriage of passengers over its lines. It does not authorize the carriage of freight, express or mail, or of baggage, except the implied permission to carry customary hand baggage in the personal custody of the passenger. The proof shows that the cars of the Joliet company are operated by the same power as those of the Aurora company, and are of like shape and character, and of like size and weight as other interurban cars passing over other lines of the Aurora company to its transfer station, but heavier than its own cars on the Fifth street line. So far as appears, the city has not adopted any regulations prescribing or limiting the size or weight of the cars which the Aurora company may use. Therefore the Aurora company had a right to purchase or hire cars like those of the Joliet company, and operate them over its Fifth street line, meeting the Joliet cars at the point of connection, and

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receiving transfer of passengers. If it had done so, we find nothing in the charter of the Aurora company which would have enabled the city successfully to object thereto. If the Aurora company could have carried these passengers over its line in cars of its own like those of the Joliet company, our conclusion is that it could arrange that, instead of transferring the Joliet passengers to its own cars, it would transfer the Joliet cars and passengers to its line, and conduct them to said transfer station, and from the transfer station back to the point of connection. The statute above quoted was in force when the franchise of the Aurora company was granted to it, and, in legal effect, entered into that charter. From the language of the bill and of the decree and of the opinion of the trial judge, copied into the record, and from the briefs of appellee filed herein, we think it was the intention that this decree should only restrain the city from interfering with the passage of the Joliet cars and passengers over said Fifth street line to the transfer station and back again, and that the bill did not intend to seek, nor did the court design to give, a decree establishing in complainants the right to transfer baggage, freight, express and mail. Yet there are some ambiguous expressions in the decree hereafter noted, which might bear that construction. We hold that as the charter of the Aurora company did not authorize it to carry baggage, freight, express and mail over its line, it had no power to make a valid contract with the Joliet company for the carriage of such merchandise within the city limits. The transportation of such merchandise is the proper business of a commercial railroad, and is not within the ordinary charter rights of a street railroad, nor is it within the grant to the Aurora company. *Wilder v. Aurora, DeKalb & Rockford Electric Traction Co.*, 216 Ill. 493; *Hartshorn v. Ill. Valley Traction Co.*, 210 Ill. 609; *Harvey v. Aurora & Geneva Ry. Co.*, 174 Ill. 295; *Pa. R. R. Co. v. Montgomery Co. Pass. R. R. Co.*, 167 Pa. St. 62, 27 L. R. A.

766; C. & N. W. Ry. Co. v. M. R. & K. E. R. Co., 95 Wis. 561, 37 L. R. A. 856; Zehren v. Milwaukee E. R. & L. Co., 99 Wis. 83, 41 L. R. A. 575; and Diebold v. Ky. Traction Co., 117 Ky. 146, 63 L. R. A. 637.

2. The answer asserted that the Joliet cars were heavier than the Aurora cars, and might harm the roadways and a certain viaduct in the city over which they pass. The charter of the Aurora company did not limit the size or weight of the cars it might operate. The city, by that charter, did retain the right to regulate the manner of operating the Aurora road as the public safety might require. As already suggested, it does not appear that the city had adopted any regulations concerning the weight of cars to be operated upon the lines of the Aurora company. It is manifest such regulation would have to be reasonable, and would have to be fixed by an ordinance duly adopted, and that the city could not, by a mere resolution, forbid certain cars from passing over the street railway. A mere resolution is not a law. Permanent legislative regulations by a municipality must be by ordinance, and not by a resolution which can be passed by a mere majority of a quorum and takes effect without the approval of the mayor. Such regulations should be general and apply equally to all like cases within the municipality. *People v. Mount*, 186 Ill. 560; *City of Paxton v. Bogardus*, 201 Ill. 628; *People v. Blocki*, 203 Ill. 363. Moreover the weight of the cars was not at all the objection made in the resolution passed by the city council, as before stated. It is also set up in the answer that the cars of the Joliet company do not stop at each street to take on passengers, and that the Joliet company does not issue transfers to passengers in its cars within the city limits, and that its cars have a toilet room. The charter of the Aurora company, so far as our attention is called to it, does not require the Aurora company to stop its cars at each street. It does not appear that the city has passed any ordinance establishing such regulations, or for-

bidding the use of toilet rooms on cars within the city. If it should do so, and if that ordinance should be violated, or if the provision of the charter of the Aurora company with reference to transfers has been violated, the city would have a proper remedy, but that remedy would not be to forbid the Aurora company to transport the cars of the Joliet company over the Fifth street line. It is asserted in the answer that wires of the Aurora company passing along the Fifth street line, other than the wire which conducts the cars on that line, carry a greater current of electricity than is necessary to operate said line within the city limits only, and a current dangerous to human life, and that it thereby supplies power to conduct the cars of the Joliet company some miles beyond the city limits. The city had not taken any action in reference to the current passing over those wires, and the bill was not filed to litigate the right of the companies to have such current upon such wires of the Aurora company, and that part of the answer which was devoted to that subject was not germane to the bill of complaint. The same is true of several other allegations in the answer which need not be considered. We have only incidentally touched upon the questions raised by the exceptions sustained to portions of the answer, and by objections sustained to proof offered by defendants. If we are correct in holding that the bill and the decree were only intended to relate to the transfer of Joliet cars over the Fifth street line containing only passengers and what is customarily carried by a street railway, then those rulings were generally correct and the decree is correct. If the purpose of the bill and decree had been to restrain interference with the transfer of baggage, freight, mail and express in Joliet cars over the Fifth street line, a different conclusion would follow.

3. The answer asserts that the rights under which the Aurora company is operating its Fifth street line

came from two sources: one, a charter granted to a prior street railway company, which, by its terms, was not assignable, and therefore the Aurora company, by the assignment to it of that charter, did not acquire the right to operate that line; and the other, a charter granted to an individual, and by him assigned to the Aurora company, which charter was void, because an individual cannot take such a grant. A special certificate taken by appellees shows that in argument, and in answer to questions by the court, counsel for defendants conceded that the city, having permitted the Aurora company to act for years under assignments of those charters, and to build its lines and operate them, was estopped to interfere with the Aurora company in conducting its own cars and business upon the Fifth street line. This concession was in harmony with the authorities. *Village of Winnetka v. C. & M. E. Ry. Co.*, 204 Ill. 297. An effort is made to show that in a brief filed in the lower court counsel for the city conceded more than that, but we deem this immaterial. In our view of the statute above cited, and of the authority thereby granted, the Aurora company, having the right to operate this Fifth street line itself, had the right to make this contract so far as related to the transfer of passengers in passenger cars of a size and weight not forbidden by its charter nor by an established and reasonable municipal regulation. But if that were not so, it cannot be ousted of the franchises and licenses which it is exercising and using and had been exercising and using for years, by virtue of a decree in favor of the city as defendant in a bill in equity. The remedy to oust the Aurora company of any franchise and license it is improperly exercising, is at law.

4. While the framework of the bill was aimed at the action of the court in preventing the Aurora company from carrying these cars with passengers over its line, yet the prayer of the bill was broader, and the

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preliminary injunction restrained defendants from in any manner interfering with the Aurora company and the Joliet company in the running and operating of cars leased by the Aurora company from the Joliet company over its Fifth street line. The decree adjudged that the temporary injunction be made permanent, and that the city and its mayor and officers be permanently enjoined from interfering with the Aurora company and the Joliet company in the exercise of their rights under said contract, in the running and operating of cars leased by the Aurora company for the transportation of passengers by said Aurora company over its Fifth street line from the point of connection to the power house near said transfer station. The first part of said decree, making the temporary injunction permanent, would forbid the city to interfere not only with the transfer of cars containing passengers, but also with the transfer of cars containing freight, baggage, mail and express. In our view it should have been restricted so as only to forbid an interference with the transfer of passenger cars and passengers. So much of the decree as in general terms makes the temporary injunction permanent will be reversed, and the rest of the decree will be affirmed. Appellants will pay three-fourths and appellees one-fourth of the costs of this court.

Reversed in part and affirmed in part.

Mr. Justice WILLIS granted the temporary injunction in the court below, and therefore took no part in the consideration of the cause in this court.

**Chicago & Alton Railway Company v. Hugh C. Wilson,
Administrator.**

Gen. No. 4,580.

1. *ORDINANCES—how irregularities in adoption of, may be explained.* Where the journal kept by the clerk of the city council contains irregularities and discrepancies with respect to the mode, manner and time of the adoption of ordinances, parol evidence is competent to aid such journal and the recitals thereof.

2. *ERRORS—not shown by abstract will not be considered.* Where the abstract does not show the ruling of the court upon objections urged and an exception to such ruling, the alleged errors predicated thereon will not be considered on review.

3. *HABITS OF CARE—when competent in action for death caused by alleged wrongful act.* Proof of the careful habits and sobriety of the deceased is competent in an action for death caused by alleged wrongful act where no one saw the accident which resulted in death.

4. *CONTRIBUTORY NEGLIGENCE—what competent upon question as to whether deceased was in exercise of, when attempting to cross railroad tracks.* One attempting to cross railroad tracks in the face of an approaching train is justified in assuming that such train will not run at a greater rate of speed than that permitted by ordinance in force at the place of the accident.

5. *JUDGMENT—when not excessive.* A judgment for \$2,500 in an action for death caused by alleged wrongful act is not excessive where it appears that the deceased was a woman, fifty-nine years of age, who left her surviving a husband and five children, as her heirs at law and next of kin, for whom she was accustomed to keep house and serving by way of house cleaning, washing, etc., receiving by way of compensation for other outside work one dollar per day and averaging in her earnings about \$1.50 per week.

Action on the case for death caused by alleged wrongful act, Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed July 17, 1906.

J. L. O'DONNELL and T. F. DONOVAN, for appellant;
WINSTON, PAYNE & STRAWN, of counsel.

CHARLES F. HANSON and BROWNE & WILEY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The main line of the Chicago & Alton Railway Company passes through the village of Braceville in a northeasterly and southwesterly direction. Main street in said village west of said railroad runs east and west, but as it comes within about one hundred feet of the right of way on the west, it turns southeast and crosses the right of way at right angles, and continues in that direction. The village contains 1,200 or 1,500 inhabitants, and has but two streets which cross the railroad. Mrs. Annie Wilson lived on Main street on the south side of the railroad. On the evening of October 24, 1903, she left her home and went about two blocks west of the railroad and bought groceries and meat, and was seen returning home on the north side of Main street carrying her bundles, just before a fast passenger train from the northeast passed southwesterly without stopping. She did not return to her home. She made a business of working for other people, house cleaning, nursing in sickness and the like, and at the time was frequently in attendance on a certain sick woman. When she did not return her husband concluded she was staying with some one who was sick. Some boys that evening found packages along the track. Next morning her dead body was found on the southeast side of the crossing about twenty feet from the nearest rail and seventy-five feet from the crossing. Her administrator brought this suit to recover for the loss to her next of kin. The declaration charged her death to the high and dangerous rate of speed at which defendant drove the train over that crossing; to the failure to give the signals required by statute; and to the violation of an ordinance of said village limiting the speed of passenger trains within the corporate limits to ten miles per hour. There was a plea of not guilty, a jury trial, a verdict for plaintiff for \$3,000, a *remittitur* by plaintiff.

iff of \$500 and a judgment for plaintiff for \$2,500; and this is an appeal by defendant from said judgment. It is argued that the court erred in admitting in evidence the ordinance, and certain photographs, and proof of the careful habits of deceased; that the proof shows deceased was guilty of contributory negligence which should bar a recovery; and that the damages are excessive.

1. Plaintiff offered in evidence a printed book, which purported to be the revised ordinances of the village of Braceville and which purported on its title page to be printed and published by authority of the president and board of trustees of the village of Braceville; and especially offered said title page, the preliminary ordinance, the certificate of the clerk at the end of the volume, and section 2 of chapter 30, entitled "Railroads," which limited the speed of a passenger train within the corporate limits to ten miles per hour. The preliminary ordinance was as follows:

"Laws and ordinances of the village of Braceville. Be it ordained by the president and board of trustees of the village of Braceville:

"Section 1. That the laws and ordinances governing the village of Braceville, as revised and arranged in sections and chapters by Thomas F. Clover, attorney at law, and passed by the board of trustees, on the 4th day of February, A. D. 1885, and approved by the president of the board of trustees, on the 4th day of February, A. D. 1885, be and the same are hereby ordered printed in book form, to be entitled, 'Revised Ordinances of the village of Braceville.'

"Sec. 2. This ordinance shall be in force from and after its passage.

"Passed and approved February 4th, A. D. 1885.

"Isaac Wilcoxon, President of the Board of Trustees.

"Attest: Thomas Jack, Village Clerk."

At the close of the ordinances were these words: "Passed and approved February 4th, 1885. Isaac Wilcoxon, President. (Seal of the Village of Braceville.) Attest: Thomas Jack, Village Clerk." After this came the following certificate: "State of Illinois, Grundy County, Village of Braceville. SS. I, Thomas Jack, Village Clerk of the Village of Braceville, do hereby certify that the foregoing ordinances, as revised by Thomas F. Clover, were adopted by the Board of Trustees of the Village of Braceville on the 4th day of February, 1885, and that the original copy of said ordinances is on file in my office in said village. Witness my hand and the seal of the said village this 4th day of February, 1885. Thomas Jack, Village Clerk. (Village Seal.)"

Section 4 of article five of the general act for the incorporation of cities and villages enacts as follows in regard to proof of ordinances: "All ordinances and the date of publication thereof, may be proven by the certificate of the clerk, under the seal of the corporation. And when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees or the city council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned in such book or pamphlet, in all courts and places without further proof."

The book here offered in evidence complied with the above statute. It is strongly argued here by plaintiff that the legislature intended by the foregoing statute to make such book of ordinances so printed and published conclusive proof both of the passage and of the legal publication of the ordinances. But we do not need to decide that question. The trial court held it was *prima facie* proof thereof. The jury was then withdrawn, and defendant offered proof to identify the journal of the council proceedings, and then

offered that book in evidence and especially pages 278 to 286, inclusive, showing proceedings at meetings of the village trustees on February 2 and February 9, 1885, from which it is claimed that no meeting was held on February 4, 1885; that the revised ordinances were adopted on February 2, 1885; and that chapter 30 thereof as adopted was upon the subject of rules, and not of railroads. The journal shows a meeting of the village board convened on February 2, 1885, for the purpose of considering the revised ordinances; that all the members were present; and that a motion was carried to take up and adopt the ordinances chapter by chapter. The journal then gives the number of each chapter, beginning with chapter one, and in most cases enumerates the number of each section in that chapter. It gives the yeas and nays upon the adoption of each chapter, and shows each chapter adopted. In a few cases the number of sections in a chapter is not given. After the adoption of chapter one an adjournment to one o'clock is shown. There is no reference in this journal to chapter 15, but chapter 16 follows immediately after chapter 14, and the enumeration then proceeds in due order. This makes the last chapter adopted chapter 39, whereas there are but chapters 1 to 38 inclusive in the published book. Still there are only 38 chapters shown as adopted in the journal. The only case in which the journal shows the subject of the chapter is chapter 30, which the journal shows related to "Rules," while in the printed book chapter 30 relates to "Railroads" and chapter 31 to "Rules." The number of sections in a chapter bearing a given number as stated in the journal does not always agree with the number of sections in the chapter bearing that number in the printed book. The error in omitting to number one chapter as chapter 15 in the journal does not explain all the apparent discrepancies. At the close of the proceedings is an unanimous vote in favor of the report of the

committee, which, we take it, means an adoption of the ordinances as an entirety. Plaintiff called E. L. Clover, a lawyer, and proved by him that he is a brother of Thomas F. Clover, named in said preliminary ordinance as the one who had prepared the revision, and that said Thomas is ill in California; that the witness was present with his brother during all the time the village board was discussing and adopting said revised ordinances; that each chapter was read and voted upon and adopted by the call of the yeas and nays; that each chapter of the book as published was read and was adopted upon the call of the yeas and nays; and that the session lasted either three or four days. Part of this testimony was no doubt incompetent, but it was introduced in the absence of the jury, and without any ruling that it was competent; and we think plaintiff could properly show that though the session began on February 2 it lasted till February 4, and thus explain how it came that, as shown by the certificates to the printed ordinances, they appear as passed and approved February 4. It shows that the clerk in writing the journal treated the sessions devoted to the revised ordinances as all embraced in one legislative day, as is occasionally done in Congress and other legislative bodies. The one adjournment till one o'clock which the clerk noted may have been till one o'clock the next day, or February 3, and he failed to make any note of the adjournment from that day to February 4.

In our judgment this proof does not overcome the published book of ordinances. To defeat the case made by the introduction of that book and its title page and certificate, it was necessary to show that the ordinance was not adopted by the village board. This journal shows that a set of revised ordinances containing thirty-eight chapters was adopted. It shows that the clerk made at least one error in giving the number of a chapter, and continued that error through

the chapters which followed, and it leaves a suspicion and perhaps a probability that when it comes to printing them some changes may have been made in the order of some of the chapters, and consequently in their number. But that would not show that these revised ordinances were not adopted, or that chapter 30 of the printed volume, relating to railroads, was not adopted. But, further, the village clerk whom defendant called to produce this journal, had only been in office a little over a year. His testimony, when all considered, is only that this journal is the only record book of the proceedings of the village board for the year 1885 that he knew about, but that he had other books, though not of that kind. Section 11 of Article 6 of the City and Village Act is as follows: "The clerk shall record, in a book to be kept for that purpose, all ordinances passed by the city council or board of trustees, and at the foot of the record of each ordinance so recorded shall make a memorandum of the date of the passage and of the publication or posting of such ordinance, which record and memorandum, or a certified copy thereof, shall be *prima facie* evidence of the passage and legal publication or posting of such ordinances for all purposes whatsoever." There is nothing to show that the then clerk of the village of Braceville did not perform that duty and so record these ordinances. If so, it would be as much a record of the city as is this journal, and as competent proof of their passage. Defendant therefore did not show that there was in the clerk's office no proof of the passage of the revised ordinances, and of chapter 30 thereof, on February 4, 1885. Section 2 of chapter 30 of said ordinances was properly admitted in evidence.

2. The abstract does not show any error in relation to the admission of the photographs. It shows that they were offered, and that defendant made certain objections. It does not show what ruling the court made upon said objections, nor that defendant ex-

cepted thereto. Errors not shown by the abstract will not be considered. But upon turning to the record we find defendant did not except to the admission of the photographs. All the record shows on that subject is that the court said: "I think I will give the defendant the benefit of an exception and let it go in." But defendant did not avail of that offer, and the remark of the court could not create an exception in favor of defendant. But, further, the offer of these photographs was preceded by testimony by Hugh Wilson, the plaintiff, as to their correctness as a representation of the locality as it was at the time of his wife's death, and explaining the very slight difference in one photograph, and all that testimony by Wilson is omitted from the abstract. That omission precludes the consideration of the objection. Defendant cannot be permitted to omit from the abstract the evidence laying a foundation for this proof, and then be heard to argue that the foundation was insufficient to support the ruling. The abstract shows no basis for disturbing the judgment because of the admission of the photographs.

3. Proof was made by plaintiff of the careful habits and sobriety of deceased. Such proof is competent where no one sees the accident which results in death. *I. C. R. R. Co. v. Nowicki*, 148 Ill. 29; *C., B. & Q. R. Co. v. Gunderson*, 174 Ill. 495; *Dallemand v. Saafeldt*, 175 Ill. 310; *I. C. R. R. Co. v. Prickett*, 210 Ill. 140. Plaintiff's proofs did not disclose that any one saw the accident. When testimony of this character was first offered defendant objected on the ground that such evidence was only competent where nobody witnesses the accident. The attorney who made that objection was then asked if he claimed there was an eye-witness of this accident, and he made no reply. This is omitted from the abstract. It was after that silence that the court admitted the testimony. There was certainly no error in its admission under those

circumstances. When defendant introduced its proofs it called the engineer, and he testified that he saw deceased just before she was struck; that she appeared to have time to get over ahead of his train; and that he did not stop and did not know she was struck till next day. If the introduction of that proof by the defense had any tendency to render incompetent plaintiff's proof relative to the careful habits of deceased, a motion should then have been made to exclude it, or the matter should in some way have been brought to the court's attention, and a ruling asked in view of the change in the proofs. That was not done. Under plaintiff's proofs, it was properly admitted, and its exclusion was not afterwards asked.

4. Was deceased guilty of contributory negligence? This was a question of fact, and we cannot repeat all the proofs bearing upon that subject. As deceased came near the crossing there were on the northwest side of the tracks between her and the approaching train two large trees, two houses, one less than 48 feet from the nearest rail of the said track and the other less than 56 feet therefrom (as to the situation of which houses the abstract is very misleading), and these houses were surrounded by trees, there was a beer depot distant less than six feet from the nearest rail, and there was a large clay hill much higher than the train and about one hundred feet wide according to the scale on the plat and perhaps ten feet from the side track. The side track, which was northwest of the main track, was four feet and eight inches between its rails, and the distance from its south rail to the nearest rail of the main track was eight feet and two inches. Two box freight cars stood upon the side track about ninety feet northeast of Main street. The engineer testified that he saw deceased when he was opposite the clay hill, (which was about six hundred feet from Main street), and that he then whistled; and the fireman corroborated this proof as to the whistling to some extent. Witnesses for plaintiff testified that the

only whistling was when the engine was about at the depot, which was southwest of Main street and after the engine struck deceased. Deceased was entirely familiar with that crossing. The engine had a powerful electric head light. The engineer testified that deceased looked towards him when he was at the clay bank, hesitated, stepped back a little, and then went on across the track and that he supposed she had plenty of time to cross, and thought no more about it till he heard next day of her death. From all his evidence we conclude it was after she crossed the side track and had got beyond the line of the box cars that she turned her face towards the approaching train, hesitated and then went on. In passing upon the question whether deceased was negligent in proceeding we must consider that she had a right to expect the train to run at not exceeding ten miles per hour (*B. & O. S. W. Ry. v. Then*, 159 Ill. 535; *C., B. & Q. R. R. Co. v. Gunderson*, *supra*), and if it had been restricted to that speed from the time she saw it she would not have been struck, and also, that if the engineer, who knew of the speed of the train, felt so sure she had time to cross that he did not even look on the other side to see if she did get across, surely deceased might well have entertained the same belief, when she knew nothing of the great speed of the train. The fact that other people several blocks away saw or heard this train or saw the reflection of its headlight on the sky, has little bearing upon the question whether deceased should have seen it through these trees, houses, freight cars, beer house and clay hill. In view of all the circumstances we have stated, and other facts appearing in evidence, we conclude that the proof is such that a verdict either way upon the question whether Mrs. Wilson was exercising due care for her own safety, approved by the trial judge, could not be disturbed in this court upon the ground that the jury ought to have found the other way.

5. Are the damages excessive? Mrs. Wilson was fifty-nine years old, and left a husband and five children, all grown up. She and her husband occupied part of a house, and a married son and his wife the other part. She was accustomed to do the housework and sewing for herself and husband, and then she went out working at house cleaning, washing, taking care of women in confinement, nursing in sickness, and the like. She had been doing this for sixteen years. She received therefor about \$1 per day, and on cross-examination her husband testified she averaged \$1.50 per week anyway. She sometimes went out three or four days in a week, sometimes the whole week, and sometimes she did not go out at all. Her wages supported herself and her husband, who was sixty-eight years of age. We know of no scale by which the pecuniary value to her husband of the continuation of this woman's life can be precisely estimated. A recovery might properly embrace not only what he would receive from her earnings, but also the value of her services to him in the household. Perhaps we should not have estimated the mere pecuniary loss resulting to him from her death as high as the jury did, but we find nothing in the verdict to warrant us in saying that it indicates that the jury were swayed by passion or prejudice, and we do not feel warranted in disturbing the judgment for \$2,500.

6. The train went through the village at a speed of from 50 to 60 miles per hour. If the jury had found specially that it was negligence to run at that speed through a village of that size, with only two places where the streets crossed the railroad, that conclusion could not have been disturbed under the proofs in this case, and that proof warranted a verdict under the first count. *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132; *E. J. & E. Ry. Co. v. Raymond*, 148 Ill. 241. But there was an ordinance limiting the speed, and this train was run at a speed five or six times as great as the law permitted. This violation of the ordinance

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was negligence and authorized a recovery under the third and fourth counts. *C., C., C. & St. L. Ry. Co. v. Baddeley*, 150 Ill. 328; *C. & E. I. R. R. Co. v. Mochell*, 193 Ill. 208.

The judgment will be affirmed.

Affirmed.

George M. Stephen, Administrator, v. Illinois Central Railroad Company.

Gen. No. 4,647.

1. *COMITY—when cause of action arising in foreign state will be enforced in Illinois.* A right of action which has accrued in another state of the Union will be enforced in the courts of this state, unless prohibited by law or unless it is against morals or natural justice or unless it is against the general interests of the citizens of this state.

2. *VALIDITY OF STATUTE—effect of assignment of error with respect to, in Appellate Court.* The assignment of an error in the Appellate Court questioning the validity of a statute operates to oust the jurisdiction of that court to consider the appeal.

3. *STATUTORY CONSTRUCTION—function of a proviso.* The ordinary function of a proviso is only to qualify or limit what is enacted by the rest of the section to which it is appended. This rule, while rigid in some states, is relaxed in Illinois where the intention of the legislature controls, and the effect of the proviso is sometimes to enlarge the force and effect of the statute and to operate, to an extent, as an independent enactment.

4. *INJURIES ACT—amendment of 1903 construed.* The language of the amendment of 1903 to the Injuries Act as follows: "Provided further, that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state," though held a proviso, is construed to have the effect of an independent enactment and to prohibit the bringing or prosecution in this state of an action to recover damages for death occurring outside of this state.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed June 1, 1906.

DANDRIDGE & PUGH and MANLY & KRAMER, for appellant; JOHN STUART ROBERTS, of counsel.

D. B. SHERWOOD, for appellee; J. M. DICKINSON, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

George M. Stephen, as administrator of the estate of George Carpito, deceased, brought suit against the Illinois Central Railroad Company in the Circuit Court of Kane County, to recover the damages caused to the next of kin of plaintiff's intestate by his death. Each count of the declaration alleged that plaintiff's intestate was killed on or about April 12, 1904, at a place north of Covington, in Tipton County, Tennessee, while plaintiff's intestate was at work for defendant upon its railroad bed there, and because of the negligence of defendant, its foreman, and its servants in various specified respects. At the close of the declaration plaintiff set out as a part of each count of the declaration certain sections of the statutes of Tennessee, which he averred were in full force at the time plaintiff's intestate was injured, by which statutes railroad companies were required to observe certain precautions to prevent accidents, and were made responsible for damages occasioned by failure to observe said precautions, and the burden of proof and the measure of damages were prescribed; and it was averred that in Tennessee the rule that contributory negligence defeats a right of action does not apply, and that in such case the contributory negligence of the person injured or killed does not prevent a recovery, but only goes in mitigation of damages. Defendant was summoned, and filed a general and special demurrer to the declaration. The special causes of demurrer assigned were (1) that the declaration shows the cause of action is for the death of plaintiff's intestate, which is shown to have occurred in the State of Tennessee, and that

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an action therefor is prohibited by the statutes of Illinois; (2) that the declaration does not state a cause of action which entitles plaintiff to have the said statutes of Tennessee enforced in this state; (3) that said statutes of Tennessee have no extra-territorial effect, and plaintiff is not entitled to have them enforced by the courts of this state; (4) that the allegation that by the laws of Tennessee contributory negligence is not applicable to the case cited in the declaration, is a mere conclusion of the pleader, and is argumentative and insufficient. The court sustained the demurrer; plaintiff elected to abide by his declaration, and there was a judgment for defendant, from which plaintiff prosecutes this appeal.

It is a rule of law well settled in this state that a right of action which has accrued under a statute of one state of this Union will be enforced in the courts of a sister state thereof, unless prohibited by law, or unless it is against morals or natural justice, or unless it is against the general interests of the citizens of the state where the remedy is sought. C. & E. I. R. R. Co. v. Rouse, 178 Ill. 132, and cases there cited; and also cases cited in note to B. & M. R. R. Co. v. Hurd, 56 L. R. A. 193, on page 196; and also in note to B. & O. S. W. Ry. Co. v. Read, 56 L. R. A. 468; and also in 22 American & English Encyclopedia of Law, 2nd ed., 1378, 1380. Under C. & E. I. R. R. Co. v. Rouse, *supra*, the statutes of Tennessee set out in this declaration are not regarded in this state as against morals or natural justice, or hostile to the general interests of our citizens. Therefore they must be enforced by our courts unless such enforcement is prohibited by law. Section 2 of chapter 70 of the Revised Statutes of Illinois, entitled "An act requiring compensation for causing death by wrongful act, neglect or default," was amended in 1903, and by said amendment the following among other language was introduced into the act, to wit: "Provided further, that no action shall

be brought or prosecuted in this state to recover damages for a death occurring outside of this state." If these words be given their natural or ordinary meaning, they expressly prohibit the bringing and the prosecution of the present action in the courts of this state.

We are not at liberty to consider whether this statute may be contrary to public policy or for some other reason invalid. If it had been intended to make that contention, the appeal should have been taken to the Supreme Court direct. If the invalidity of the statute were involved we could not entertain this appeal. But appellant treats this statute as valid, and we must so consider it.

The position of appellant is that the words above quoted are only a proviso, and that the proper effect of a proviso is only to qualify or limit what is enacted by the rest of the statute or section; that its office is only to except something from the enactment, or to qualify or explain its generality, or to exclude some possible misinterpretation of what is intended to be included in the body of the act or section; and that its proper office is to qualify, restrain or limit, but not to enlarge the act. Reliance is had upon *Huddleston v. Francis*, 124 Ill. 195; *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276; *Gaither v. Wilson*, 164 Ill. 544; *In re Day*, 181 Ill. 73. Such is the general rule. "One of the offices of a proviso is to qualify the generality of the body of the sentence of which it is a part, though it can have no potency to enlarge the scope or force of the enactment." *Burke v. Snively*, 208 Ill. 328. In some jurisdictions this rule is declared to be so inflexible that if independent legislation be attempted under a proviso, it is declared void. But most courts decline so rigid a principle, but establish a qualification to meet such a case. It is said in *In re Day*, *supra*, that while it is not the legitimate office of a proviso to enlarge the enactment to which it is appended and to operate as a substantive enactment itself, "there is authority, however, for holding that the intention

of the legislature, if plainly expressed, is to have the force of law, although in the form of a proviso." So, in Sutherland on Statutory Construction, section 223, while stating the general rule as to the natural and appropriate office of a proviso as above, it is said, "the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect. It is not an arbitrary rule to be enforced at all events, but is based on the presumption that the meaning of the law-maker is thereby reached. * * * The intention of the law-maker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed is paramount to form." So, in 26 Am. & Eng. Ency. of Law, 2nd ed., 679, after stating that a proviso is confined by construction to the subject-matter of the section of which it is a part, this is added: "This rule is, however, not absolute, and if the context requires the proviso may be construed as extending to and qualifying other sections or even as being tantamount to an independent enactment." In *Farmer's Bank v. Hale*, 59 N. Y. 53, it was held that if a proviso is repugnant to the purview of the act, the proviso is not void, but stands as the last expression of the legislature. In *Carroll v. State*, 58 Ala. 296, the court said: "It does not necessarily follow because the term *provided* is used, that which may succeed is a *proviso*, though that is the form in which an exception is usually made to, or a restraint or qualification imposed on, the enacting clause. It is the matter of the succeeding words, and not the form, which determines whether it is or not a technical proviso." In *Georgia Banking Co. v. Smith*, 128 U. S. 174, it was held that while the general purpose of a proviso is as above stated, yet the word "provided" is often used in statutes in other senses, and is often used to precede an amendment to a bill, where the word "but" or "and" is meant, and simply serves to separate or

distinguish the different paragraphs or sentences. In *U. S. v. Babbitt*, 1 Black, 55, it was held that what followed the word "provided" in the act there construed was not limited to the section in which it was found, but that it was an independent proposition. In *Whartensleben v. Haithcock*, 80 Ala. 565, the court said: "Generally, the appropriate office of a proviso is to restrain or modify the enacting clause or preceding matter, and should be confined to what precedes, unless the intention that it shall apply to some other matter is apparent. When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection." In *Mayor of Cumberland v. Magruder*, 34 Md. 381, where important language in an act before the court for construction was found under the word "provided," and it was sought to limit its force to that of a mere proviso, the court in vigorous language declared that no such narrow interpretation ought to be adopted, and that the plain and imperative and salutary language of the clause there in question should not be defeated by any nice construction founded on its position or connection or the technical word by which it was prefaced and that it was as potent as if enacted in a separate section. *Bank v. Manfg. Co.*, 96 N. C. 298. There are other similar decisions.

If the words in question here be treated as a mere proviso, they only mean that no action shall be brought or prosecuted in this state under chapter 70 of the Revised Statutes to recover damages for a death occurring outside of this state. But neither by the earlier

language of that amended section 2, nor by any provision of that chapter before said amendment, was a right of action given for a death occurring outside this state. In any suit brought in this state for an injury inflicted in another state "the law of the place where the right was acquired or the liability incurred will govern as to the right of action, while all that pertains to the remedy will be controlled by the law of the state where the action is brought." C. & E. I. R. R. Co. v. Rouse, *supra*, where cases so holding are collected. In 22 Am. & Eng. Ency. of Law, 2nd ed., 1378, 1380, it is said that the act which is the cause of the injury and the foundation of the action must be actionable by the law of the place where the injury is done; that it will not be sufficient that a right of recovery is given by the statute of the jurisdiction where redress is sought; and that whatever would be a defense to an action of tort, if brought in the state where the tort was committed, is a defense in the state of the forum, unless against the policy of the forum, and it is such a defense even if it would not have been a defense if the cause of action had arisen in that state. That the cause of action depends upon and is given only by the law of the place of the injury is further sustained by cases cited in a note in 56 L. R. A., on pages 210, 211 and 217. Chapter 70 of the Revised Statutes therefore never gave, as indeed its language did not purport to give, a cause of action for injuries inflicted or death caused in another state. It follows that to interpret the clause here in question as a mere proviso qualifying the former part of said section 2, or the whole act, would make it meaningless. But the legislature had some purpose to serve in inserting these words. The only interpretation we can put upon them which will give them any force or make them accomplish any purpose is to hold, as we do, that this was intended by the legislature as an independent provision or enactment forbidding the bringing or

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prosecution of any action in this state to recover damages for a death occurring outside of this state. We consider the legislative intent too plain to be disregarded.

As each count showed that the cause of action arose and the death occurred in the state of Tennessee, we are of opinion the progress of the suit could properly be arrested by a demurrer.

The judgment is, therefore, affirmed.

Affirmed.

William K. Schell, Administrator, v. Elias Weaver.

Gen. No. 4,634.

1. ADMISSIONS—*when competent against decedent's estate.* Admissions by an intestate made understandingly and deliberately, testified to by a truthful witness of good memory, are admissible and constitute competent evidence to bind the estate of such party.

2. STATUTE OF LIMITATIONS—*upon whom burden rests to establish.* The plea of the Statute of Limitations is affirmative in character and its establishment by proof must be made by the party urging it.

3. STATUTE OF LIMITATIONS—*what sufficient consideration to sustain new promise to pay and to remove bar of.* The original debt is a sufficient consideration and will sustain a promise to pay a debt otherwise barred by the Statute of Limitations.

4. PROPOSITIONS OF LAW—*upon what must be predicated.* Propositions of law are properly refused where not predicated upon any evidence in the case and which do not reflect any issue thereof.

5. PROPOSITION OF LAW—*cannot be in the nature of a demurrer to the evidence.* A proposition of law is properly refused which is in form as follows: "that the plaintiff is not entitled to recover in this case": this for the reason that propositions of law should present questions of law pure and simple and should not be, as this one was, mere statements of a conclusion of law and fact to be decided both from the evidence and from the law.

Contested claim in court of probate. Appeal from the Circuit Court of Carroll county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed July 17, 1906.

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FRED ZICK, for appellant.

RALPH E. EATON, for appellee.

MR. JUSTICE THOMPSON delivered the opinion of the court.

Appellee filed his claim at the May term, 1905, of the Probate Court of Carroll County against appellant, administrator of the estate of Thomas T. Schell, deceased. The claim filed was for \$1,216.40, itemized as money loaned \$985.50, interest on same at five per cent., \$230.90. The Probate Court on a trial found against claimant. The case was taken to the Circuit Court of said county and a jury being waived, upon a hearing before the court, a judgment for \$1,200 was rendered in favor of claimant against said estate.

Appellant insists there was no evidence upon which to base the judgment, and that the court improperly admitted evidence of statements or admissions of the deceased, Thomas T. Schell, made to one Charles F. Michael. Claimant offered himself as a witness, and objections being made, was not permitted to testify, and the only evidence of importance in the case is that of the witness, Michael. Michael testified that he was a farmer, forty-five years of age, and that he resided at first eight, then twelve and fourteen miles from Schell; that he had known Elias Weaver twenty years and Thomas T. Schell twenty-five years; that Schell had come to Michael's farm and hired Weaver in 1889 or 1890, when Weaver was staying with him; that in the latter part of May or first of June a year ago last May or June he met Schell on the sidewalk north of Evans' Lumber Office in Milledgeville. "He shook hands with me and asked me whether I knew where Elias Weaver was. I said 'I don't know.' He said, 'Well he gets to your place off and on and I thought you would know where he was.' I said he left my place last September and I suppose he is in Pennsylvania somewhere. He said 'I would like to know

where he is. I owe him \$1,000 borrowed money and some interest, about \$200. I am ready to pay it and would like to settle with him.' He said 'I want to know where he is real bad.' I said 'You can find out by writing to Cumberland County, Pennsylvania, where he has some brothers and sisters living.' He said he had about \$3,000 from him and had paid it all but the \$1,000 and \$200 interest." Michael also testified that Weaver was assessed for \$7,000 or \$8,000 and that he was a laboring man working for farmers around there and loaning out his money. The only other evidence was that Schell died August 5, 1904, and that Weaver was in Pennsylvania from August 25, 1904, to April 1905. It was also developed on the trial that Michael was not an agent of Weaver and had no interest or authority in the matter.

Whether the foregoing evidence was properly admitted, and whether it justified the court in rendering a judgment for claimant, are the two vital questions in this case. The judge saw the witness and could judge of his truthfulness. Admissions by an intestate, made understandingly and deliberately, testified to by a truthful witness of good memory, are admissible and competent evidence to bind an estate (*Dieterman v. Ruppell*, 103 Ill. App. 106; *North v. Zerwick, Admr.*, 97 Ill. App. 306; *Ginders v. Ginders*, 21 Ill. App. 522); and such evidence may be most satisfactory (*Northwestern Ry. Co. v. Button*, 68 Ill. 409; *Mauro v. Platt*, 62 Ill. 450); and judgment may be recovered on admissions alone. *North v. Zerwick, Admr.*, *supra*.

It is claimed the judgment is for a larger amount than the amount of the claim filed. The claim filed was for \$1,216.40, while the judgment is only for \$1,200, so this point will be passed by with the observation that the claim as filed was for the amount due May 10, 1905, and the judgment was not rendered until August.

Appellant insists that the claim was barred by the

Statute of Limitations, and that the burden of showing that it was not barred was upon claimant. While it is true there were no written pleadings in the Probate Court, the same rules as to the burden of proof control and govern the trial as in a suit begun in the Circuit Court. The plea of the Statute of Limitations is an affirmative plea and the party alleging it must prove it, unless such proof is made by plaintiff. *Haines v. Amerine*, 48 Ill. App. 570. There was nothing in this case to show when the cause of action accrued, and until that fact was made to appear in some way, and that the claim was barred, claimant did not have to meet that proposition. If the claim had proved to be barred by the statute, then it would become necessary to prove a new promise, either to claimant or to an authorized agent.

The propositions of law marked "held" by the trial court announced the principles of law heretofore stated in this opinion, and it is unnecessary again to review them.

Appellant complains of the refusal of his second proposition of law: "That a promise to pay or an admission of indebtedness without any consideration is invalid." If this was intended to state that a promise to revive an indebtedness against the Statute of Limitations must have a consideration, then the original indebtedness would be a sufficient consideration if the promise is made to the creditor or an authorized agent, or if it is sought to test the question of the admissibility of a debtor's admissions as evidence, then it has been shown that such admissions are competent evidence and the proposition was properly refused.

The third, sixth, seventh and eighth refused propositions of law are respectively concerning "an account stated," "a presupposition of better evidence," "a note or written agreement," and "an oral agreement as to interest, not to be performed within a year." There was no evidence in the case upon which to base

any of these propositions. Interest was claimed, but it was legal interest given by statute; not interest by agreement. The propositions were not applicable to the case, would not aid the court in its decision of any question involved, and there was no error in refusing them.

The tenth proposition asked by appellant is: "That the plaintiff is not entitled to recover in this case." This is not a question of law, but a conclusion of law and fact to be decided from the evidence and the law. It is in the nature of a demurrer to the evidence. It raises the question of the sufficiency of the evidence to sustain the finding for claimant (*First National Bank v. Northwestern Bank*, 152 Ill. 296; *Gilbert v. Sprague*, 196 Ill. 444) and was properly refused.

Finding no error in the case, the judgment of the Circuit Court is affirmed.

Affirmed.

CASES
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1906.

**Illinois Central Railroad Company v. Trustees of
Schools, for use, etc.**

1. **VARIANCE**—*what constitutes.* Evidence of injury to land and the building thereon by vibration of passing trains is inadmissible where the declaration does not allege that injury resulted to such land and building from such cause.

2. **INJURY TO REAL PROPERTY**—*what essential to recover for, resulting from construction and operation of railroad.* To recover in such case it is necessary to prove that the plaintiff suffered a special damage with respect to his property in excess of that sustained by the public generally.

3. **DECLARATION**—*how far allegations of, must be proven.* Allegations, though unnecessary, if made, must be proved.

Action in tort to recover damages to real property. Appeal from the Circuit Court of Jackson county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

SIDNEY F. ANDREWS and A. P. HAMBURG, for appellant; J. M. DICKINSON, of counsel.

JAMES H. MARTIN, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

We adopt appellant's statement of the case as quite

sufficient for discussion of the errors assigned and considered in this appeal.

The plaintiffs, appellees, sue as trustees of schools for the use of School District No. 2 in the city of Murphysboro, Jackson county, Illinois. They seek to recover damages from appellant railroad company under the constitutional provision that private property shall not be taken or damaged without just compensation.

The railroad is constructed and operated on appellant's own premises adjoining the school house grounds. It is built in a natural depression upon an embankment about eighteen feet high, bringing the track about on a level with the first floor of the school house. The school house is a two-story brick building. The main building is 50x70 with a wing on the east and west side, said wings being 18x22. The main building was built in 1867-68. The railroad is on the south of the building. The south line of the school lot, which is about two acres in extent, is the north line of the railroad right of way. The railroad was built in 1898. From the center of the railroad track to the school house is 188 feet. The ground slopes from the school house to the railroad right of way. The railroad consists of one track with a grade of about one per cent. ascending toward the west.

The declaration consists of one count in which it is averred that appellant constructed its railroad track south of said premises and is maintaining and operating a railroad thereon and charges that in passing said school premises the locomotive engines emit, discharge and throw out and stir up great volumes of smoke, cinders, ashes and dust and cast and throw the same daily over, upon and into said premises; that numerous trains pass said premises daily, and by reason of their great weight and momentum, and the rapidity of their speed, cause loud and ominous noises and make the ground to tremble, vibrate and shake, thus causing the school in said premises to be disturbed, and frequently suspended; that the value of

said premises has depreciated on account of the alleged injuries in the sum of \$8,000.

The case was first tried in the Circuit Court of Jackson county, on January 17, 1902. The jury on that trial failed to agree and the cause was continued. A year later another trial was had and on January 16, 1903, the jury assessed the plaintiff's damages at \$2,500. A *remittitur* of \$700 having been entered by the plaintiffs, judgment was rendered for \$1,800, and an appeal allowed to this court, where the case was heard at the August term, 1903, and an opinion filed affirming the judgment. 112 App. 488. On appeal to the Supreme Court that court in an opinion filed October 24, 1904, reversed the judgment of this court and of the Circuit Court and remanded the case. 212 Ill. 406. The case was again tried and, on October 7, 1905, the jury assessed the plaintiff's damages at \$3,000, upon which verdict the court, after overruling the defendant's motion for a new trial and motion in arrest of judgment, entered judgment on the verdict. From which judgment appellant appealed to this court.

This action was originally brought, tried, prosecuted and defended on appeal through the Appellate and Supreme Courts, upon the theory that the special damages sustained by appellees were in the disturbance of the school and the use of the property for school purposes, caused by the noise, vibrations, dust, cinders, ashes and smoke from the engines and trains in operation on appellant's railroad. In the last trial, and on this appeal, the appellees seem to have abandoned altogether any claim for damages to the use of the premises for school purposes by reason of school disturbance, other than that caused by injury to the building, and to rely solely upon injuries to the property due to vibration of the ground and, as it is now claimed, the consequent cracking and crumbling of the walls of the school building. In the trial appellees' testimony was directed to prove the effect upon the building of vibra-

tion caused by moving trains over the railroad. A number of witnesses were called and testified upon this question. To this testimony appellant made timely objection upon the ground stated, that no injury was alleged or damages claimed to the building or land itself from the vibration mentioned in the declaration. The objection was overruled, exceptions preserved, and the ruling of the court in that regard is now properly before us for review on error duly assigned. It is insisted by counsel for appellant, and as we think with sufficient reason, that there was here a variance between the allegation and proof respecting the damage claimed and the cause producing it. It is an established rule that the proof must accord with the allegations, that the evidence must fit the pleading, and, to be relevant and admissible, must bear upon the issues made by the pleading. This is a fundamental proposition from which there will be no dissent. The rule is stated in 22 Ency. Pl. & Pr. 527: "It is a general rule in actions at law, that in order to enable a plaintiff to recover or a defendant to succeed in his defense, what is proved or that of which proof is offered by the party on whom lies the *onus probandi* must not vary from what he has previously alleged in his pleading; and this is not a mere arbitrary rule, but is one founded in reason and good sense, as well as good law." In *Wabash Ry. Co. v. Billings*, 212 Ill. 37, the Supreme Court, after a general statement of the rule that the allegations and proofs must correspond, adds: "both for the purpose of specifically advising the opposite party of what he is called upon to answer, and also of preserving a record of the cause of action as a protection against another suit based upon the same cause of action." Further on, in the same opinion, it is said: "Every allegation which is descriptive of the cause of action must be proved as alleged in the pleading, and any variance therefrom is fatal unless it is waived by not calling it to the attention of the trial court or is

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cured by an amendment of the pleading. Even if there are unnecessary allegations, descriptive of what is material, they must be proved." The allegation under which the testimony was offered and challenged in this case is, "that numerous trains pass said premises daily, and by reason of their great weight and momentum and rapidity of their speed, cause loud and ominous noises, and make the ground to tremble, vibrate and shake, thus causing the school in said premises to be disturbed, and frequently suspended; that the said railroad is of a permanent nature and will entail continuous damage to plaintiff." How, and in what way? In the manner alleged, by "causing the school on said premises to be disturbed and frequently suspended." To recover in this case it was necessary to prove that appellees suffered a special damage with respect to their property in excess of that sustained by the public generally. *Rigney v. Chicago*, 102 Ill. 64; *Aldrich v. Metropolitan W. S. El. R. R. Co.*, 195 Ill. 456. Under the law and the circumstances shown, it may not be assumed that appellees sustained damage with respect to their property in excess of that sustained by the public generally, that is, that the damages here sought to be recovered necessarily accrued from the operation of trains over the railroad. In such case, it would seem that they were required, under the rules of pleading, to allege the particular damage sustained, to enable them to give evidence of it. *Adams v. Gardner*, 78 Ill. 568. But, whether required to so allege or not, it was done in this case, and having alleged the special damage, the evidence should have been confined to that allegation, for it may fairly be presumed to include all the damages claimed. *English v. City of Danville*, 69 App. 288. A party may aver unnecessarily more than is required to sustain his cause of action, but, as a general rule, he must prove the averments of his pleadings as he makes them. *Bell v. Senneff*, 83 Ill. 122; *Wabash Western Ry. Co. v. Friedman*, 146 Ill. 583; *Lake St. El. R. R. Co. v.*

Collins, 118 App. 270. If to the declaration in this case we apply the rule which obtains in the construction of contracts, and give to it the interpretation as construed by the parties themselves, it may fairly be said that damages of the character now claimed were not in contemplation when the declaration was filed, or on the first appeal, until after the opinion of the Supreme Court was announced. Concerning a departure in action or defense of a case that has once been tried, the Supreme Court, in Telford v. Howell, 220 Ill. 58, said: "While it is true that pleadings may be amended, varying the statement of the cause of action or ground of defense, so as to make the same conform to the real facts, as developed or ascertained in the progress of litigation, yet, it is also true, that a radical change in the pleadings as to those facts of which the party making the amendment must all the time have had personal cognizance, is calculated to arouse suspicion and to call for a careful examination of the circumstances under which the new theory of the case is thus advanced." See also W. R. R. Co. v. Jones, 121 App. 390. There was no change in the pleadings as there should have been to accord with a complete change in theory respecting the nature of the damages sustained. The evidence offered as to damages was not within the allegations of the declaration and should have been ruled out. There was a material variance, to which the attention of the court and counsel was called in apt time and this might have been avoided by an amendment. Without this evidence, improperly admitted, the verdict is without support, but as there is some evidence which, under proper pleading, may tend to prove the recently discovered damages, the judgment will be reversed and the cause remanded.

Reversed and remanded.

C. D. Cook v. Sarah A. Lynch, Administratrix.

1. WITNESS—*what does not impeach.* The impeachment of a witness is not accomplished by showing a variance between statements made in and out of court with respect to matters immaterial to the issue.

Action in assumpsit. Appeal from the Circuit Court of Jefferson county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

BURTON & WHEELER and WILLIAM H. GREEN, for appellant.

J. P. CARTER and G. GALE GILBERT, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

Appellee brought suit in assumpsit against appellant, to recover the proceeds in the collection by appellant of six certain promissory notes, claimed to have been the property of appellee's intestate, David E. Lynch. The declaration is in the common counts with one special count by which it is alleged, that on May 1, 1904, D. E. Lynch was the owner of six promissory notes, known as the Lennington notes, of the value of \$1,400; that he delivered the same to the defendant for collection; that on May 2, 1904, Lynch died intestate; that plaintiff was appointed administratrix; that on June 1, 1904, defendant collected \$1,400, and on September 15, 1904, promised to pay plaintiff the said sum, etc. The Statute of Frauds was pleaded to the whole declaration, and demurrer thereto sustained. Error is not assigned, nor argument made, upon the court's ruling in sustaining the demurrer to pleas, and this requires no further consideration. It appears from the evidence that on October 24, 1892, John and Amanda Brenner, husband and wife, executed six

promissory notes of \$100 each, payable in one, two, three, four, five and six years, respectively, from date, to the order of John F. Lennington, and to secure the same mortgaged to Lennington fifty acres of land. On October 23, 1893, by writing on the back of the mortgage, Lennington assigned the mortgage and notes to C. D. Cook, appellant. The notes also bear the indorsement of John F. Lennington. In June, 1904, C. H. Burton, as attorney for appellant, collected \$850 on the notes and mortgages, and remitted to Cook the proceeds, \$793. It appears further that in 1903 Cook was surety on a note given by D. E. Lynch to Watson who obtained judgment and had execution issued and by arrangement through the constable, D. E. Lynch, his wife and son executed their note for \$114, for one year to Cook who paid the execution. The last note has not been paid. It is claimed by appellee, upon whom rests the burden of proof, that the Lennington notes and mortgages were the property of D. E. Lynch, taken by him in exchange for land sold to Lennington, and that afterwards they were placed with Cook for collection or to indemnify him as a surety for Lynch on the Watson note. There is some evidence in the record tending to prove this contention, and for that reason the trial court did not err in refusing the peremptory instructions to find for the defendant. But after a careful consideration of all the evidence in the record we are constrained to hold that the verdict and judgment is against the manifest preponderance of the evidence. By the assignment and indorsements of the mortgage and notes Cook was vested with the legal title in October 1893. So far as disclosed by the evidence his right and possession was not questioned in upwards of ten years. There is no showing of business transaction or other circumstance or relationship between Cook and Lynch near or about the date of the assignment from which it may be inferred or surmised that the property in the notes was other than that presumed by the law from the indorsement

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and possession by Cook. That he was surety for Lynch on a small note to Watson in 1904 which he paid after judgment and execution only upon condition that Lynch give him a secured note for the amount instead of proving that the Lennington notes were held by Cook, either for collection or as security, tends rather to prove the contrary. The testimony of Mrs. Lennington that her husband, John F. Lennington, traded six notes to Lynch for land does not clearly identify the notes in controversy, but though they are the notes of which she testified, the only effect of the evidence would be to supply a missing link, not otherwise shown, viz., that Lynch at that remote time owned the notes. It would still remain for appellee to account for the assignment to Cook about that date. The chief reliance of appellee is upon the testimony of witnesses as to conversations with Cook, from which it is contended that Lynch's title and interest in the notes was admitted. There is no evidence of positive admission, and all that was said by the witness from which such admission might be inferred was contradicted by appellant. Appellee's third given instruction is erroneous and specially calculated to mislead the jury under the evidence. The jury was told that "in this case if you believe from the evidence that any witness has made statements off the witness-stand at variance with his or her testimony here, and has in this manner been successfully impeached," they would be justified in disregarding the testimony of such witness unless corroborated. Variance between statements and testimony as to facts not material to the issues on trial does not effect an impeachment of the witness. Other instructions complained of will probably be corrected in another trial to meet the criticism made on this appeal.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Dora E. Eddleman v. Arnaud A. Fasig.

1. **EXTENSION OF TIME**—*when refusal of court to grant, for the purpose of taking testimony, not error.* Such action by the court is not ground for reversal in the absence of a showing of resulting prejudice.

2. **CROSS-EXAMINATION**—*when new party loses right of.* A new party defendant, if he has a right to cross-examine witnesses who have already testified, loses such right by failing promptly to apply therefor.

3. **VARIANCE**—*when will not reverse.* A slight variance which does not result in prejudice will not reverse.

Bill in chancery. Error to the Circuit Court of Union county; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

DAVID W. KARRAKER, for plaintiff in error.

JAMES LINGLE, for defendant in error.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is a proceeding by bill in chancery, filed November 1, 1901, by George W. Smith, to redeem certain premises claimed by Dora E. Eddleman, plaintiff in error, by virtue of a deed executed the same day the bill was filed by Ida M. Browning and J. Daniel Browning, wife and husband. Afterwards, Smith, the complainant, assigned his interest in the premises to Arnaud A. Fasig, defendant in error, who was substituted as sole complainant. By amendment of bill, Ida M. Browning and husband, J. Daniel Browning, were made defendants, and by intervening petition plaintiff in error also became a party defendant. The Brownings were defaulted and, in due course of proceedings, the cause was brought to a hearing before the court on issues between the plaintiff and defendant herein, and a decree duly entered, from which the record is brought to this court on writ of error.

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It is represented by the amended bill, that on November 1, 1900, George W. Smith, complainant, was the owner in fee of the lot or land in controversy, and to secure the payment of \$280 and interest owing by him to the Anna Building and Loan Association, he executed and delivered a deed for said lot to the said association, but that it was agreed and understood, between the grantor and grantee, that the said deed was given as security and that upon the payment of the said sum of \$280 and interest the said association would reconvey said premises to complainant; that on January 28, 1901, complainant borrowed of Daniel Browning and wife, Ida M. Browning, the sum of \$280 with which to pay the said building association, and to secure the payment of the Brownings on or before the 20th day of January, 1901, according to agreements then made, caused the said building association to convey the said lot by deed to the said Ida M. Browning, together with an assignment of the insurance policy for \$300, covering the said premises; that it was expressly agreed and understood between complainant, the Anna Building and Loan Association, and the said Daniel Browning and Ida M. Browning, that the said deed and insurance policy were to be held simply as security for the payment of the money borrowed, and that the lot would be reconveyed to the complainant upon payment of the debt and interest. It is further represented that the building on said premises was destroyed by fire February 10, 1901, and that the loss (\$300), covered by the policy assigned, was paid to Ida M. Browning, which being applied to the debt fully satisfied the same; that complainant made demand upon the Brownings for an accounting and reconveyance of the premises, which was refused. From the plaintiff's petition to become a party defendant, her answer to the amended bill, and the evidence in the record, it appears, that late in the day on which the original bill was filed and summons served upon Daniel and Ida M. Browning, and

while Smith and the Brownings were in serious dispute and controversy, culminating in the commencement of this suit, the deed under which plaintiff claims title was executed. All the material allegations of the bill stand as confessed by the Brownings who suffered default, and it only remains to determine whether plaintiff was a purchaser of the lot in good faith and without notice of defendant's equity. From the evidence it is clear that the conveyance by the Brownings was to escape the threatened proceeding in court for adjustment of the controversy with Smith, and colorably to avoid the settlement of a just and equitable claim. The evidence fully warrants the finding that William M. Eddleman was agent of the plaintiff, his wife, throughout the transaction by which the deed from the Brownings was obtained, and knowledge or notice of Eddleman of Smith's rights or claim to the property was binding upon plaintiff. That Eddleman, the husband and agent, knew substantially the condition of Browning's title and Smith's claim to the property at the time of the fire, February 15, 1901, is fully proven and not denied. The circumstances under which this information was obtained and the reasonable inference from other facts presented that he was advised of the controversy between Smith and Browning, and knew of the suit pending or threatened, at the time he took the deed, warrants the conclusion and the decree that he was plaintiff's agent, and therefore plaintiff herself was charged with knowing of Smith's claim upon the property. Though the doctrine of *lis pendens* may not apply if the Brownings were not served with summons prior to delivery of the deed, yet if plaintiff knew that a bill had been filed, and the purpose thereof, she will be charged with notice of defendant's claim, and therefore is not to be considered an innocent purchaser. At the June term, 1904, after complainant's evidence in chief had been taken, plaintiff became a party defendant by petition, the cause was referred to the master, the defendants

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ruled to close evidence by October 1 and complainant's rebuttal evidence by November 1, 1904, and the cause continued. The cause was again continued at the November term and at the March term, 1905, plaintiff, on petition granted, was substituted as complainant. Plaintiff moved for an extension of time in which to take evidence in defense. This was denied and the cause was referred to a special master to take evidence of defendant's interest in the property, and again continued. Complaint is made that the court denied plaintiff's motion for further time to take testimony. Neither in the affidavit in support of the motion nor in the record is there any showing that plaintiff was prejudiced by the action of the court. So far as it now appears from this record, there is nothing from which it can be said that plaintiff could have produced material evidence had further time been given, nor was sufficient reason given for failure to comply with the rule of the court requiring the evidence in defense to be concluded by October 1, 1904. If plaintiff wished to cross-examine witnesses examined before she became a defendant, timely motion for such leave should have been made. This was not done, and the right to cross-examine, if such right existed, was waived. Leave to cross-examine complainant's witnesses was not embodied in the motion for further time. Other irregularities touching the order of proceedings are criticised, but we find nothing of omission or commission to effect an impeachment of the decree. Inasmuch as the property in controversy is correctly described in defendant's petition and in the decree, the slight variance from that contained in Browning's deed to plaintiff will not justify a reversal in this case. The plaintiff can in no wise be prejudiced by the redemption.

The decree of the Circuit Court will be affirmed.

Affirmed.

A. M. Orr v. James Waterson.

1. *VARIANCE*—*what does not constitute, where allegations are general.* Where the allegations of the declaration are general and sufficiently broad to include proof made, no variance exists.

2. *VERDICT*—*when not set aside as against the evidence.* A verdict will not be set aside as contrary to the weight of the evidence unless clearly and manifestly so.

Action on the case. Appeal from the Circuit Court of Wabash county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the February term, 1906. Affirmed Opinion filed September 14, 1906.

E. B. GREEN and THEO. G. RISLEY, for appellant.

MUNDY & PHIPPS and H. R. FOWLER, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This was an action on the case brought by appellee against appellant to recover damages for personal injuries sustained while appellee was in the employment of appellant as a log-hauler. The substance of the charge found in each of the three counts of the declaration, to which the defendant pleaded not guilty, is that on September 12, 1903, defendant was the owner of land in Knox county, Indiana, under the management of defendant's agents, that plaintiff was employed in loading and hauling logs with a team of horses, log-wagon, chains, cant-hooks and other logging appliances, furnished by the defendant, and that defendant "negligently and wrongfully permitted and allowed said chains and appliances to be and remain in an unsafe and dangerous condition" whereby the plaintiff was injured. A trial by jury resulted in a verdict and judgment for \$4,000, from which the defendant appealed.

Appellee and Ollie Moutray were in the employ of

appellant as log-haulers. They were each supplied with a team of horses, log-wagon, chains, cant-hook and other necessary appliances for the business, and both had been engaged in hauling logs for some time prior to September 12, 1903, the day of the injury. On the day mentioned they were engaged in hauling logs, already cut and prepared, from a hillside to which they had previously been directed by Lee Orr, the superintendent. In loading a large log upon the wagon driven by Moutray the wagon was brought alongside the log, the skids properly placed, with the log-chain around the log. Moutray caught the logging chain with the grab hook, which was fastened to the double-tree, and drove the horses to roll the log upon the wagon. Appellee, who was assisting Moutray in this operation, was behind the log for the purpose of chocking it with blocks on top of the bolster to prevent it from rolling off the wagon. To properly adjust the log it was necessary to back the horses, which was done by appellee or on his direction. When this was done, the grab-hook let go the chain, the log rolled back and appellee was caught between the log and a tree and his leg crushed. The direct cause of the injury is attributed by appellee to the defect or unfitness of the grab-hook in use on the Moutray wagon, and upon this theory the case was tried. The grab-hook in use by Moutray was taken by him several days prior to the accident from another wagon belonging to one Beard. Moutray's grab-hook had been broken and he was directed by Cad Orr, a superintendent of work on the farm, to use Beard's double-tree and grab-hook until the broken hook was repaired. The Beard hook was too large for the chain and the purpose for which it was used, a fact not known to appellee, and appellee claims that by reason of this defect or unfitness, it was a dangerous appliance.

The first contention urged by appellant's counsel is that there is a fatal variance between the declaration

and the proofs. In this connection we may, at the same time, consider points 1, 2 and 3 of appellant's argument, as under each the relevancy or lack of evidence is the principal ground for the contention made.

Now, as to the variance. That a party must recover, if at all, on the case made by his declaration, and that in an action based on negligence the allegations of the declaration and the proofs must agree, is an ancient and well-established proposition of law, not only in this state, but wherever the common law procedure prevails. The difficulty in this case is not in determining what is the law with respect to variance, but in making the application urged by counsel. We first look to the declaration to see what is charged. In every count is found the allegation that "the plaintiff was employed by the defendant in loading and hauling logs with a team of horses, log-wagon, chains and other appliances * * * furnished the plaintiff" by the defendant. It is not alleged, as contended by counsel, that the injury to appellee occurred while loading appellee's wagon, in the particular sense that it was the wagon driven by appellee, but it should be taken that "said wagon" referred to the one driven by Moutray as well as to the one driven by appellee, for both were "furnished the plaintiff" and Moutray, and were appliances used by them in the work to which they had been assigned by their employer, the appellant. The need for a more specific allegation as to which was being loaded might have been ground for special demurrer; but having pleaded to the declaration, the allegation is not now to be construed as meaning one rather than the other, for it is sufficiently comprehensive to include both. The negligence charged is that the defendant "permitted and allowed the said chains and appliances to be and remain in an unsafe and dangerous condition." Here again the plaintiff might have been required to particularize, but was not, and, under the plea, evidence in proof of any defect in any appliance in use by plaintiff was admissible.

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Whether appellee when injured was in the line of duty under his employment, and whether the defective or unsafe appliance complained of was furnished to him and Moutray for work in loading the wagon, are questions quite within the issues made by the pleading, to be determined by the jury from the evidence. We are, therefore, of opinion that there was no variance between the declaration and proofs, that the modification of appellant's instructions 6 and 7 was proper, that it was not error to give appellee's instructions 9 and 13, and that there is evidence to which no objection was made, tending to prove all the material allegations in the declaration. The question of whether appellant's foreman ordered appellee and Moutray to work together, whether the hook was defective and the cause of the injury, whether appellant furnished the hook or knowingly permitted its use or by the exercise of reasonable care should have known of its use, whether the appellee was guilty of contributory negligence or assumed the risk to which he was exposed, were, under the evidence, pleading and circumstances of this case, properly submitted to the jury; and their verdict, in the absence of prejudicial error in the proceedings, must be held as conclusive of the rights of the parties. There was conflict of evidence upon contested points, but we are not prepared to say that the verdict is contrary to the manifest preponderance, nor do we find in the record anything from which it may be said that appellant has been prejudiced in his right to a fair trial. The injury proved is serious and permanent, the pain and suffering great, and we do not think the damages excessive. The judgment of the Circuit Court will be affirmed.

Affirmed.

George Rosan v. Big Muddy Coal & Iron Company.

1. DAMAGES—*what may be recovered in action for personal injuries.* The only damages that may be recovered in an action for negligence are such as are the natural and reasonably to be expected result of the defendant's acts, and the consequences must be such as in the ordinary course of things would follow from the acts and could be reasonably anticipated as a result.

2. PROXIMATE CAUSE—*what not, of injury.* Held, that the backing or crowding of the mule, back against the moving car, and the slip and fall of plaintiff under the car, appearing in the case, are not the ordinary and natural results of an imperfect light or inadequate ventilation.

3. WILFUL VIOLATION—*what essential to liability of mine owner for.* Not only must there be a wilful violation and a resulting injury to a servant in order to recover, but such servant must be within the class contemplated by the statute and within the purpose and protection for which the law was enacted.

Action on the case for personal injuries. Error to the Circuit Court of Jackson county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

LIGHTFOOT & HARKER, for plaintiff in error.

PERCY WERNER, for defendant in error.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This action was brought by plaintiff in error, against the defendant in error, to recover damages for personal injuries sustained while employed as a mule-driver in a coal mine operated by the defendant in error. In the mine there was a main east entry extending east from the shaft, twelve north entries, numbered from the west, running north from the main entry, and twelve south entries, likewise numbered from the west, running south from the main entry. The current of fresh air,

forced into the mine by machinery, passed through the north entries in order from west to east successively, beginning with number two, and returned through the south entries in like order from number twelve. While driving a mule hitched to a loaded car through the ninth south entry in which there was a slight incline, the mule stopped and crowded back, the light from the miner's lamp carried by the plaintiff went out, he slipped and fell between the mule and the car and was severely injured.

The declaration contains three counts. In substance the first count charges the defendant with negligence in failing to supply that part of the mine where plaintiff was injured with a sufficient current of fresh air to sustain combustion in the lamps and prevent them from going out, and that by reason of such negligence the plaintiff's lamp was extinguished, causing the injury sustained. The second count charges wilful violation of section 19 of the Miner's Act, providing for the ventilation of the mine and the forcing of currents of fresh air throughout by a fan or other artificial means. The third charges wilful violation of section 16, clause (b), which provides that the mine manager shall order the withdrawal of the men from the mine in certain contingencies, and until thorough ventilation has been re-established. The defendant filed the plea of not guilty. At the conclusion of all the evidence the court instructed the jury to find for the defendant, and a verdict and judgment was rendered accordingly. The plaintiff saved exceptions to the ruling of the court in taking the case from the jury, and brings the record to this court on writ of error. The only question to be determined is, whether or not there is any evidence in the record which by any reasonable interpretation tends to prove a cause of action as alleged in either one of the counts of the declaration. To sustain a cause of action every material allegation must be proved, and the lack of evidence tending to prove any material al-

legation leaves the plaintiff without right to recover, and in such case, after the evidence is all in, it is the duty of the court to take the case from the jury and direct a verdict for the defendant. In an action for damages the allegation that the alleged negligence caused the injury is material and must be proved, and where there is lack of evidence tending to prove such allegation, the action must fail. By the first count it is alleged, in effect, that inadequate ventilation and the limited supply of fresh air caused the plaintiff's lamp to go out and that the extinction of the lamp caused the injury. We find in the record no evidence tending to prove this allegation. The only testimony of how the injury occurred is that of the plaintiff himself. He says (Abstract p. 31): "When I started down the entry on this last trip of mine, my light became dim. There is a slight incline going out there in room 51. As the light got dim, the mule slacked up; as the mule slacked up, I hollered to him to go ahead; he kindly stepped up again, but came back. The light was very dim and the air was poor. I threw my left hand on his back and my right hand on the front of the car to keep it from bumping against him. The mule stopped and crowded back. The light went out. I slipped between the mule and the car. It was dark. My right foot went down in front of the car between the car and the mule; my other foot was on the bumper. * * * The rib on the right hand side was so close that one could not get out of the way of the car. * * * My feet were dragging. The car run on top of me." Here is a series or number of events or circumstances without causal connection, beginning with a dim light and ending with the plaintiff falling from the car. The negligence charged must be the proximate cause of the injury. This proposition will not be disputed. The only damages that may be recovered in an action for negligence are such as are the natural and reasonably to be expected result of the defendant's acts, and the consequences must be such as in the ordinary course of

things would flow from the acts and could be reasonably anticipated as a result. "Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances—a result beyond and over which the negligent party has no control." *Brown v. Craven*, 175 Ill. 401. Within this definition, and after allowing all justifiable inferences that can be drawn from the evidence, it cannot be said that the damages sustained by plaintiff are the natural and proximate result of the negligence charged. The backing or crowding of the mule, back against the moving car, and the slip and fall of plaintiff under the car, are not the ordinary and natural results of an imperfect light or inadequate ventilation. And in this, we think, all reasonable minds would agree without hesitation or dissent, after allowing every reasonable inference justified by all the evidence in the case. That the accident was not reasonably to be anticipated as a result of the defendant's omission to supply the mine with sufficient fresh air, and therefore not the proximate result of such omission, is evidenced by the fact that neither the plaintiff, nor any of his witnesses who testified, anticipated the danger or effect now alleged as the result of impure air. It caused discomfort, and caused the lights to go out, and endangered the health of the men, that is all that was claimed by the witnesses, and that is all that could reasonably be anticipated as the ordinary, usual and natural consequence. That there could be any danger of the kind indicated to any one working in the mine, from lack of ventilation, could not, we think, reasonably be anticipated. For a result so unusual and extraordinary the defendant cannot be held liable.

Under the second and third counts, as under the first, it must be proved that the damages sustained are the

proximate result of insufficient ventilation. It is alleged that the defendant wilfully violated the statute, and, in consequence, that the plaintiff was injured. Whether the evidence shows a wilful failure on the part of the defendant to comply with statutory requirements, we need not inquire, for the reason that the alleged injury is not within the purpose of the statute invoked, and even though injury in the manner described were caused by imperfect ventilation, there could be no recovery. There may be a wilful violation of the statute by the master, and a servant may be injured thereby, and still the servant may not be entitled to recover damages for such injury. Unless the servant is within the class contemplated by the statute and within the purpose and protection for which the law was enacted, he is without remedy in an action of this kind. *C. & St. L. Ry. Co. v. Halbert*, 179 Ill. 196; *Williams v. C. & A. R. R. Co.*, 32 App. 339; *Lumaghi v. Voytilla*, 101 App. 112; *Foster v. Swope*, 41 Mo. App. 137. Section 19 of the statute, and clause (b) of section 16, relate to sanitary conditions of the mine as affected by ventilation. It was the purpose of the law, and is so expressed in the statute, that a current of fresh air should be maintained throughout the mine "sufficient for the health and safety of all men and animals employed therein." In the case of *Carterville and Herrin Coal Company v. Moake*, *post*, p. 133, the construction of section 19 was involved, and it is held, that an injury occasioned by the explosion of a keg of powder was not within the purpose of the statute, and that a wilful failure to provide cross-cuts as required in clause (g) would not render the mine owner liable for damages for such injury. To the same effect and a like construction of the statute, this court is committed by opinion in *Davis Mining Co. v. Gettleman*, 126 App. 549. But, whether within the purview of the statute or not, there was no evidence tending to prove that the negligence as alleged in the

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first count, or the wilful violation of the statute as alleged in the second and third counts, was the proximate cause of the injury complained of. The judgment of the Circuit Court must, therefore, be affirmed.

Affirmed.

Carterville & Herrin Coal Company v. William Moake.

1. **MINE OWNER**—*what essential to recovery against.* There can be no recovery against a mine owner for alleged wilful violation of the Miners' Act unless a causal connection between the injury suffered and the alleged wilful failure to comply with the statute is shown.

Action on the case. Appeal from the Circuit Court of Williamson county; the Hon. WARREN W. DUNCAN, Judge, presiding. Heard in this court at the February term, 1906. Reversed, with finding of fact. Opinion filed September 14, 1906.

E. E. DENISON, for appellant; ED. M. SPILLER, of counsel.

PILLOW & SMITH and W. C. S. RHEA, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is an action on the case, brought by appellee against appellant, to recover damages for injuries, which, it is alleged, were caused by appellant's wilful violation of clause (g), section 19, of the Miner's Act (Chap. 93, Rev. Stat.). The amended declaration contained three counts, but the plaintiff having dismissed his suit as to the first and third, the case was submitted to the jury on the issues made by the second count alone, to which the general issue was pleaded.

The jury found for the plaintiff and assessed damages \$1,000. Judgment on the verdict was rendered and the defendant appealed. At the close of the evidence the defendant moved the court for a peremptory

instruction to instruct the jury to find the defendant not guilty. This the court refused, exceptions were preserved, and by the first and second of errors assigned the controlling question in this appeal is presented.

The appellant was operating a coal mine by means of a shaft from the bottom of which extended a main entry north and south. Forty feet north of the shaft the first east entry turned off the north main entry, extending in an easterly direction; and from this east entry, at a point 60 feet from the north main entry, another entry, known as a gang-way or air-course, extended north, parallel with the north main entry, a distance of 175 feet. This was a new mine in process of development. No rooms had as yet been opened, the air shaft was not completed, and ventilation was effected by a fan located in an entry east of the main shaft, which was partitioned so as to be used both as an upcast and downcast for ventilating air-currents. On November 16, 1904, the day of the accident, appellee was in the employ of appellant as a coal-digger. Two other coal-diggers, Italians, kept their powder-box on the west side and just within the entrance of the "gang-way" or "air-course" already mentioned. At the time of the accident the two Italians were standing near their powder-box loading some cartridges; one of them was squibbing out a blasting barrel, and the other preparing to open a keg of powder with a pick. The appellee had a twenty-five pound keg full of powder standing within eight feet of the Italians and was himself sitting on the powder-box or walking down the "gang-way" or "dead" entry as it is called, at a point 60 or 70 feet from its entrance, when the explosion occurred. The powder was ignited by one of the Italian workmen, either in squibbing the blasting barrel or in opening his powder keg with a pick. Two kegs, one of which belonged to appellee and the other to the Italians, exploded, killing the two Italians and injuring appellee.

Complaint is made by the declaration that there is no cross-cut opening every sixty feet in the "gang-way" extending north from the first east entry, and for failure to provide such cross-cuts the appellant is charged with a wilful violation of the statute. In the view we take of this record, it will not be necessary to decide; and we therefore express no opinion, whether under all the circumstances shown, and the plan and purpose of the operations at the time of the injury, the appellant was required by law to cross-cut between the main entry and gang-way. It is sufficient in this case that there is no causal connection between the injury suffered and the alleged wilful failure in duty. The expressed purpose of the statute in requiring cross-cuts is to secure and maintain throughout the mine currents of fresh air, sufficient for the health and safety of the men and animals employed therein; so that all parts of the mine shall be reasonably free from standing powder smoke and deleterious air. The "safety of men and animals" for which provision is made in section 19 of the statute, relates to the sanitary condition as affected by inadequate ventilation and the breathing of impure air, poisonous smoke and vapor—"deleterious air." In *Pettinger and Davis Mining Co. v. Gettleman*, 126 Ill. App. 549, the action was based upon a wilful violation of the law by the defendant in failing to provide cross-cuts; and it was alleged, that by reason of this, there was an accumulation of smoke, dust and other "deleterious air," so that the conditions of the roof of the room and the surroundings thereof could not be discovered and ascertained from the light of the miner's lamp, and because of that, it was alleged, the plaintiff did not and could not observe the dangerous conditions of the roof and avoid the injury he received from a falling rock. There, as here, it was contended that the violation of the statute was the proximate cause of the injury. We held otherwise, and said: "Section 19 of the statute pertains to the

subject of ventilation and has reference solely to the sanitary condition of the mine, the health and safety of the men as affected by the supply and circulation of air." With this construction of the statute, to which we adhere, the action fails, because there is no evidence in the record tending to prove that the injury suffered was caused, proximately or remotely, by any alleged failure of appellant respecting its statutory duties. "Evidence of violation of a statute or ordinance can tend to show actionable negligence only where the consequences, particularly or generally, contemplated by the provision in question have resulted from its violation." 21 Am. & Eng. Ency. of L. 481. Appellee was injured by the explosion of gunpowder, whether due to his own negligence or that of fellow-servants, we need not inquire. The alleged cause of injury is the master's neglect of a statutory duty and there being no proof to support the allegation it was the duty of the trial court to give the peremptory instruction requested, and it now becomes the duty of this court to reverse the judgment, with a finding of facts.

Reversed, with finding of facts.

We find, as a fact, to be incorporated with the judgment, that the alleged violation of the statute was not the proximate cause of the injuries received.

George A. Brenzel v. Ferdinand Kirschner.

1. **ERRORS**—*when will not be considered.* Errors assigned will not be considered on review where the abstract does not show the objection made and the action of the court thereon.

2. **CONTRACT**—*when not subject to construction.* Where there is no ambiguity in the language used, the instrument must speak for itself, and the parties to such contract are held to mean what they have clearly stated in writing.

Brenzel v. Kirschner.

Action commenced before justice of the peace. Appeal from the Circuit Court of Wabash county; the Hon. PRINCE A. PEARCE, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

E. B. GREEN and THEODORE G. RISLEY, for appellant.

M. H. MUNDY, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This action was brought against appellant, before a justice of the peace, to recover a balance of \$61.90, claimed to be due on an itemized account which was filed in the Circuit Court. The case was tried in the Justice Court, appealed to the Circuit Court and there again tried by a jury, resulting in a verdict and judgment for the plaintiff for the sum claimed, \$61.90. The defendant appealed and the record is now before us for review. In the trial below the total claim of the plaintiff amounted to \$154.90, and the counter-claim or set-off filed by the defendant, duly itemized, aggregated \$169.99. As against his claim the plaintiff conceded a credit to defendant of \$93.45, the sum due on a chattel mortgage obligation, leaving the exact balance \$61.90, for which the suit was brought and the verdict rendered. From this it follows that the item of \$74.55 for hauling manure, which appears in the plaintiff's claim, was allowed by the jury. The allowance of this item raises the controlling question for determination by this court. It appears from the evidence that, for two years appellee was a farm tenant of appellant, under a written lease containing this clause: "The party of the second part (appellee) agrees to draw out and spread on said land all the manure made on the premises and to haul all manure and ashes that the party of the first part (appellant) may procure for him to put on said land." Appellee testified that he at first objected to signing the lease with the foregoing clause, but upon appellant's promise that he would

pay twenty-five cents a load for hauling the manure he then signed it. He testified further, that when they commenced the hauling of manure, appellant told appellee's boy that he would pay him for hauling the manure. It does not appear from the abstract that objection was made to any of the testimony offered, or that the trial court was asked by motion or instruction to exclude evidence heard, and, therefore, the first and second of the errors assigned are not before us for consideration. The question whether or not the verdict is contrary to the evidence is made by the fifth assignment, wherein it is assigned that the court erred in overruling the defendant's motion for a new trial, in which motion the grounds are stated, that the verdict is contrary to the evidence and the law. Under the written agreement, the lease, appellee was not entitled to recover on his claim for hauling manure, nor was the evidence of appellant's promise at the time of making the lease to pay twenty-five cents a load admissible, being clearly within the established rule that parol evidence may not be heard to vary, modify or contradict a written contract. Where there is no ambiguity in the language used, the instrument must speak for itself, and the parties to such contract are held to mean what they have clearly stated in writing. By the clear and expressed terms of the lease in controversy, appellee agreed, as a part of the consideration for the use of the farm, to haul the manure for which he now makes claim. The trial court so held in sustaining objection to the testimony (as we learn from the record, but not from the abstract), and by appellant's given instruction numbered 4. There is no evidence to sustain appellee's contention of a contract made subsequent to the execution of the lease by which to sustain the claim for hauling. Giving to appellee's testimony the most liberal construction, it falls far short of proving a contract modifying or changing the then existing written contract. There is nothing in the mere statement at-

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tributed to appellant, that he would pay the boy for hauling the manure, to warrant the conclusion and finding that a new contract was entered into between appellee and appellant, whereby appellee was released from his written obligation to do the same work, and that appellant was to pay for what he had already rendered, compensation in granting the lease. There is nothing in the statement, or accompanying circumstances, to suggest a consideration or mutuality of obligation, both of which are essential elements in every contract. There can be no implied obligation to remunerate for services rendered under and required by a written obligation. Litigation of the kind disclosed by this record is to be regretted, and all the more, where the sum involved is so small, that the controversy should end with the judgment of the trial court. Nevertheless, the right to an appeal is given by law, and under the law may not be denied. It is the duty of this court, as of all others, to determine controversies and hold litigants to the legal principles and practices by which justice is attained and award judgment accordingly. For the reasons stated, that the verdict in allowing appellee's claim for hauling manure is contrary to the evidence, the judgment will be reversed and the cause remanded. As to other items in the claim of appellee and the counter-claim by appellant we express no opinion.

Reversed and remanded.

John Tetherington v. St. Louis, Troy & Eastern Railroad Company.

1. **EMBANKMENT**—*right of action for improper construction of, lies at common law.* Independent of the statute, a right of action exists in favor of a landowner injured by reason of the improper and negligent construction of a railroad embankment.

2. **EMBANKMENT**—*what essential to liability of grantee for im-*

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proper construction of, by grantor. In order to fasten liability upon a grantee for injury resulting from the improper and negligent construction of an embankment, it must appear that notice had been given to such grantee prior to suit and thereby an opportunity afforded to such grantee to correct the nuisance.

Action on the case. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

W. E. HADLEY and BURTON & WHEELER, for appellant.

FORMAN & WHITNEL and WARNOCK, WILLIAMSON & BURROUGHS, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court of Madison county, in the case of John Tetherington, plaintiff v. St. Louis, Troy and Eastern Railroad Company, defendant, in an action on the case, brought to recover for damages to the lands and crops of the plaintiff, alleged to have been caused by the obstruction of natural overflow waters by the defendant's railroad embankment. The declaration contained one count by which it is alleged that defendant "wrongfully and unlawfully erected and built * * * maintained and continued a certain levee or embankment * * * without sufficient openings therein to permit the free passage of water," thereby causing the overflow and damage to plaintiff's land and crops. During the trial, plaintiff, by leave of court, filed an additional count alleging that defendant "was possessed of, using and operating a certain railroad over a certain embankment located on its right of way; * * * that said embankment was without openings to permit the free passage of water;" that a part of the same was broken and washed away, and thereafter that "defendant wrongfully and negligently repaired

and rebuilt said roadbed embankment * * * without any openings therein to permit the free passage of water, etc.," whereby plaintiff's land was overflowed, causing damage to his land and crops. Defendant pleaded the general issue. On the trial, at the conclusion of all the evidence, the court instructed the jury to find the defendant not guilty, and verdict and judgment were rendered accordingly.

It appears, from the undisputed evidence, that the railroad bed and embankment was constructed in the summer and early fall of 1899, by the Madison Railway Company, upon its own right of way, and that afterwards, by deed of December 14, 1899, the Madison Railway Company sold and transferred its right of way, with roadway embankment, to appellee, who thereupon came into possession and has retained the title, possession and control ever since. The rights of the parties to this appeal turn upon the question whether appellee, without prior notice or claim by appellant, is liable for damages caused by the improper and negligent construction of the railroad embankment by its grantor, the Madison Railway Company. Stated in another way, does liability in an action for negligence, causing damage to real estate, run with the land in such manner that the grantee or railroad property may be held for the acts of the grantor prior to the conveyance? It is alleged in the declaration that the embankment was built without openings sufficient to permit the natural flow of water through it, that it was an obstruction and in effect a nuisance. The question here made by contention of counsel was before the Supreme Court in *Groff v. Ankenbrandt*, 124 Ill. 51, and the rule there stated obtains in this state, without exception, so far as we are informed or authority is cited. "Where a party comes into possession of land, as grantee or lessee, with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in an action for damages, until he has first been notified or re-

quested to remove the nuisance. It is not right that one, who did not put the nuisance upon the premises in the first place, should be held responsible for injuries that may not have been caused by any act of his own." The court quotes from Angell on Watercourses, "that where a party was not the original creator of the nuisance he must have notice of it, and a request must be made to remove it before any action can be brought." In Wabash Railroad Company v. Sanders, as reported in 47 App. 436, the same question, under facts very similar, was presented and decided by this court, following the Groff case, *supra*. In the Sanders case, as in this, it was contended by counsel that each overflow caused by the use of the road was a new nuisance, a continuing trespass for which the plaintiff would have a right of action, and in support of this contention cited C., B. & Q. R. R. Co. v. Schaffer, 124 Ill. 121, and O. & M. Ry. Co. v. Wachter, 123 Ill. 440, both of which are cited by appellant in his argument of this case. The court discussed these cases and held that they were not applicable to the case under consideration, and for the reasons therein stated, which we do not deem it necessary to repeat, we do not think they may be applied to the same question in the case now under consideration. Appellant further insists that by the Railroad Act, Chapter 114 Rev. St., it is expressly provided that no railroad shall construct a road-bed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof, and that failure to comply with this provision of the statute imposes a liability, not only upon the company which constructed the road-bed in disregard of the requirements of the statute, but upon its grantees and successors for all time, and that a right of action against it may be predicated upon the violation of law by the grantor without notice or request of the grantee to abate the nuisance and construct culverts or sluices as the law requires. We have seen no case that is authority for the

exception claimed, nor does it seem to us that there are any sufficient reasons, under the law, for the distinction. If in the construction of its road-bed the Madison Railway Company failed to provide culverts, sluices, or passageways for the natural drainage of appellant's land, and damage resulted, his right to an action would be independent of the statute. The right to such action is given by the common law and was neither limited nor extended by the statute. As already stated, no reason occurs to our mind, nor has any been stated, to justify a departure from the long-established rule, that before an action will lie against the grantee of land for damages caused by an obstruction or nuisance constructed by the grantor, a notice or request to remove the same must be given. The rule that notice should be given or request made before suit against the grantee, is founded in reason, no less applicable when the parties affected are corporations, than when the controversy is between individuals. It is said in support of the rule, that the grantee may assume that persons affected by the nuisance have already been compensated for the damage caused, or that they acquiesce in what is done, until notice to the contrary is given. Failing to act upon the notice or request, the grantee becomes liable, for then he is held to have adopted as his own the act of another, and for damages thereafter caused he must respond as though the nuisance were of his own creation. He is liable, not for what was done by his grantor, but for what he himself does or fails to do.

Appellant further contends that in repairing and reconstructing the road-bed after the wash-outs, as alleged in the additional count, the appellee was chargeable as of its own act in constructing the embankment complained of. This identical question seems to have been presented, considered and decided adversely to appellant's contention in the case of *Phil. & R. R. Co. v. Smith*, 64 Fed. Rep. 679, wherein suit

was brought against the Philadelphia & Reading Railroad Company, a lessee of another railroad company, for damages caused by an embankment maintained by the defendant, but which was built by the lessor company. It was there insisted that the notice was not necessary, because the defendant had actively maintained and continued the embankment by *repairing* and *stoning* the same. The court said: "It must be admitted that appellant has maintained the embankment; that it uses it as a part of its road-bed, and for that use has repaired and preserved it. Does it follow that this action, though brought without notice or request, can be maintained? There is certainly nothing in the Penruddock case (5th Coke, 101) or in any of those which follow its lead, upon which an affirmative answer to this inquiry could be based. There are cases to the effect that a feoffee or lessee is liable, without request, where he increases the nuisance; but where this is shown he is held liable to the extent of the increase only, and this upon the ground, that to that extent the nuisance is a new one and arises from his own act."

Appellant insists that the Sanders case, *supra*, as reported on second appeal in 58 App. 218, is in point and supports his contention. Our attention is called to the fact that the additional count in this case is almost identical with that in the Sanders case. In the second trial of the Sanders case, under an amended declaration, the defendant was charged with wrongfully constructing an embankment with coal slack, and with insufficient culverts, and "because of the insufficiency of the culvert, the road-bed (coal slack) was washed off the right of way on the land of plaintiff." It is also charged that defendant maintained the embankment after being notified by plaintiff to remove the same. The court says: "The evidence shows that after the defendant had taken possession and control of said railroad, it constructed a portion of the road-bed of coal slack and, under it, placed a culvert insuf-

ficient to carry off the water in time of freshet, and that it continued to maintain such portion of its road-bed of *that material* and the culvert in that condition * * * and after each wash-out, coal slack in large quantities was again used by the defendant in constructing the road-bed anew. The coal slack was carried off and deposited to the depth of several inches upon part of plaintiff's land, by repeated overflows," and thereby caused the damage. "This damage resulted from the negligence of defendant in constructing and maintaining its embankment of material liable to be washed out and deposited on plaintiff's land, and a culvert insufficient and inadequate, in violation of the duty imposed by law, independent of any statutes. For injuries resulting from the nuisance so created and maintained the plaintiff had the right to recover damages, without notifying defendant to abate the nuisance." From this it will be seen that the defendant was held to liability for the negligent and imperfect manner in constructing or reconstructing its road-bed and culverts, by reason of which the material used, coal slack, was washed upon plaintiff's land. There is no complaint by appellant in this case, that appellee was negligent in the use of material and the manner of repairs. The objection is that appellee failed to do what was omitted by its grantor, the Madison Railway Company, that is, reconstruct the embankment and provide sluices as should have been done in the first instance according to appellant's contention. The damages, if any, were because the embankment as originally built obstructed the water and flooded appellant's land and not from anything done by appellee. Appellant cites the case of C. & G. T. Ry. Co. v. Hart, 209 Ill. 414, as bearing upon his contention, that the rule requiring notice to the grantee to abate a prior existing nuisance has been changed by the statute. We do not so understand the opinion. It is there held that the lessor railroad company may be held liable

for injuries to an employe of the lessee, caused by the negligence of the lessee, while operating the road within the requirements of its charter authority. This opinion is based upon the doctrine of agency and for reasons of public policy, neither of which may be invoked in the argument of this case. The court did not even suggest the converse proposition, that an action against the lessee would lie for an act of negligence committed by the lessor before the lease was made, a rule sought to be applied in this case.

It appearing from the undisputed evidence that the embankment, which it is alleged caused the damage complained of, was constructed by the Madison Railway Company, and not by appellee, and that no claim or notice was served upon appellee prior to the commencement of this suit, the Circuit Court did not err in taking the case from the jury. The judgment will therefore be affirmed.

Affirmed.

John E. Schroeppel v. Henry Steinmeyer et al.

1. RESCISSION—*what not ground for.* A mistake of fact by one party to a contract not induced by the other party thereto, is not ground for rescission where such other party has not been guilty of bad faith.

Action in assumpsit. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded, with directions. Opinion filed September 14, 1906.

W. E. HADLEY and BURTON & WHEELER, for appellant.

WILLIAM G. BURROUGHS and WARNOCK, WILLIAMSON & BURROUGHS, for appellees.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

Appellant brought suit in assumpsit to recover damages from appellees for failure to deliver lumber according to the terms of a written contract entered into between the parties. Before final joinder in issues in the action at law, appellees filed their bill in equity to enjoin further proceedings at law and to rescind the contract upon which the suit was brought. The bill represents that appellees are dealers in lumber and that on June 10, 1905, John E. Schroeppel, appellant, applied to them for their price for certain lumber required by him in the construction of a building about to be erected; that for the purpose of giving to him the price on said lumber they set down in a column the prices of each item of lumber, the aggregate of which being the amount at which they intended to offer to sell the lumber; that the correct amount was \$1,867, but that they erroneously computed the same to be \$1,446; that believing that \$1,446 was the correct addition, they, by mistake, offered to furnish and deliver the lumber for \$1,446; that \$1,867 was the usual and customary market value of the same, and that they did not intend to furnish the said lumber for less than the market value or for less than the total aggregate amount of the price of all the items; that on June 17, 1905, appellant accepted the said offer of \$1,446 for the lumber specified; that the following day appellees notified appellant of the mistake and that they would not abide by the offer made and accepted and would not furnish the lumber at the price offered. A temporary injunction was granted. Appellees answered the bill, admitting the making of the contract and the refusal to deliver the lumber and all material averments made, and denied that complainants were entitled to the relief prayed. By agreement of parties the suits were consolidated, and tried together. The court found in favor of appellees and entered a decree

canceling the contract and perpetually enjoining Schroeppel from prosecuting his suit at law.

The decree is not justified by the evidence. The mistake from which relief is sought was that of appellees alone, and there is nothing in proof by which to authorize the rescission of the contract and impose upon the appellant the consequence of appellees' erroneous estimate or calculation in the price of lumber agreed to be supplied. There was no mutuality in the mistake. When the contract for the sale of lumber was made, entered into and signed, both parties fully understood and intended its terms and obligations as expressed. There is no evidence to impeach the good faith of appellant, or from which to say that he knew that appellees were acting under a mistake as to the prices submitted. There is evidence, not disputed in the record, that appellant acted upon the contract with appellees before notice of the mistake or refusal to comply with the agreement was given. He let his contract for brick work and accepted a loan of money to construct the contemplated building. The contention of appellees is not sustained by the authorities cited. Under their first proposition that "equity will rescind and annul an apparently valid written contract upon the ground of a mistake of fact, material to the contract, by one party only," we find cited the cases of *Sutherland v. Sutherland*, 69 Ill. 488, and *Douglas v. Grant*, 12 App. 276. In the *Sutherland* case the question was as to the construction of an ante-nuptial contract, to determine its effect *as expressed*. It was also contended that the court should have reformed the contract to conform to the construction given it by the appellant in that case. The Supreme Court affirmed the decree of the Circuit Court in the construction there given to the contract, and states as a general proposition applicable to that case, that parties are presumed to have understood the legal effect of their contract, and to rectify a written instrument, on the ground of mistake, "the evidence must be such as to

leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intention of the parties." The further statement in the opinion, a quotation from Kerr on Fraud and Mistake, that "rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be ground for rescinding, but not for correcting or rectifying an agreement," had no application to the questions under consideration, and the opinion therefore is without bearing in the case at bar. In the Douglas case, *supra*, we find the identical quotation from Kerr on Fraud and Mistake, and nothing more to suggest a reason for citation by appellee in this case. The Douglas case is interesting and not without bearing adversely to appellees' contention. The facts are similar, and the mistake sought to be corrected by bill in chancery is precisely the same in character, as that sought by appellees. The complainant sought to reform a building contract on the ground of a mistake in the estimates as to cost of material. We give the contention of complainant, as set out in the court's opinion: "It is contended, however, that, before entering into the contract, appellee (complainant), at the request of appellants, made out a specified list or bill of materials and labor that would be needed in the construction of the building, and that opposite each item in said list or bill was set down, as appellee believed, the true value on the basis of which each item was estimated, one of which items was 131,000 brick at \$12.00 per thousand; that by mistake this item was carried out at \$1,236.00, when the true sum was \$1,572.00; that by reason of this mistake the aggregate cost of the building was estimated at \$2,929.15, when the same ought to have been \$3,265.15. There is no allegation in the bill, nor does the proof show, that at the time the contract was signed, appellants (defendants) knew of the mistake alleged." In discussing the facts in that case, the court says: "If appellants did

not know of the mistake made by appellee in his estimates, at the time they signed the contract, it cannot be said they intended to contract for the payment of a larger sum than that mentioned therein. If they were aware of it, then the mistake, if any, was all on the part of appellee. But in that case there is want of mutuality in the mistake. Before a court of equity could reform it, the proof should show that the writing does not express what both parties intended it should."

The extended discussion and extracts from the foregoing cases may be excused for the reason that they are the only Illinois decisions cited by appellees in support of the main proposition for which they contend. In argument, appellees rely upon the decision of *Dunn v. O'Mara*, 70 App. 609, and quote a large part of the opinion, in support of the contention that the mistake in this case was in the execution of the contract and not one that occurred before and led to the execution of the contract, and, therefore, it was a mistake against which equity would relieve. The theory of the bill in the *Dunn* case, as stated by the court, "was that a *mutual* mistake was made by the parties, growing out of the erroneous computation of the cost of the work at the rate of 7½ cents per cubic yard." The Appellate Court reversed the judgment of the lower court as against the weight of evidence, which by a clear preponderance, according to the opinion, showed that "in making the computation appellant and appellee (both parties to the contract), erroneously found that the ditch would contain 15,233 yards. * * * That a mistake was made is quite clear, not in writing in the instrument the words 'one thousand one hundred and fifty dollars,' because both parties knew the contract contained those words at the time of signing; but the mistake consisted in the belief [by both parties] that 15,233 cubic yards of dirt were to be removed when in truth there were only 7,666 yards to be removed." The brackets are ours. This case is

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in line with the general doctrine that equity may relieve on the ground of mistake, when the mistake is mutual as between the parties to the contract, and when the contract does not express the intention of both parties to the contract. In the case at bar the contract expressed the intention of both parties as they intended to express it. The mistake, if any, was on the part of appellees alone and occurred several days before the contract was signed. We are cited to no authority, and are acquainted with none, that will justify the correction or rescission of this contract under the evidence in the record. Against such contention *Crilly v. Board of Education*, 54 App. 371, is a parallel case and very much in point. *Crilly* offered to build a school house for \$20,997. His offer was accepted and he deposited \$630 as security that he would enter into the contract upon acceptance of his bid. He afterwards discovered that he had made a mistake in transcribing his bid for presentation and placed a cipher where he intended to place the figure "3," making his bid \$20,997.00 instead of \$23,997, as he intended. He filed a bill to cancel his bid on the ground of a mistake and have returned the deposit, \$630. The relief was denied, the court holding, that the mistake, if any, was made by the party complaining and that it was not such a mistake as entitled the complainant to relief in equity. And in this case it is fair to say, that the mistake, if any, was due to the negligence of the appellees. The testimony of appellees' book-keeper, in substance, that an ordinary careful business man would have discovered the correct addition of the items in the estimate, and that the reason that it was not discovered was because Mr. H. Steinmeyer wasn't very careful about it, truly interprets the circumstances under which the mistake occurred. The bill should have been dismissed for want of equity.

The decree of the Circuit Court is, therefore, reversed, the cause remanded, with directions to dissolve the injunction and dismiss the bill.

Reversed and remanded with directions.

Illinois Southern Railway Company v. Peter Hamill.

1. **ORDINARY CARE**—*how question of exercise of, by passenger upon wagon, injured at railroad crossing, to be determined.* This question is to be determined by the jury, and it is for the jury to say whether, under the circumstances, such passenger is to be held to the kind and measure of care and caution exacted of the driver of such wagon.

2. **NEGLIGENCE**—*when not imputed.* Negligence of the driver of a wagon is not to be imputed to a passenger upon such wagon injured at a railroad crossing.

3. **MEASURE OF DAMAGES**—*instructions upon, should confine jury to evidence.* Instructions with respect to the damages, if any, to be allowed, should plainly confine and limit the jury to the evidence in the cause.

4. **EVIDENCE**—*weight to be given to positive and negative.* Positive evidence is to be accorded greater weight than that given to evidence of a negative kind.

Action on the case. Appeal from the Circuit Court of Madison county; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

R. J. GODDARD and L. M. KAGY, for appellant; E. C. RITSHER and W. T. ABBOTT, of counsel.

W. F. BUNDY, FRANK F. NOLEMAN and HOWARD GARRISON, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This was an action on the case, brought by appellee against the appellant, to recover damages for personal injuries sustained in being run over by a locomotive on a highway crossing near Centralia, Illinois. The case was tried by a jury and a verdict returned in favor of appellee for \$5,000, on which judgment was rendered, and from which an appeal was taken to this court. Exceptions were saved and error duly assigned upon rulings of the trial court in denying a motion

for security for costs, in the admission of evidence, in refusing to give a peremptory instruction requested, in the giving, modification and refusal of other instructions, and in overruling the motion for a new trial. The case was tried upon three counts of the declaration, to which the general issue was pleaded. The several counts are substantially the same and charge the appellant with negligence in failing to give the statutory signals of ringing the bell or sounding the whistle on approaching the highway crossing in question, and that the negligence charged caused the injury complained of. The declaration contains the further necessary averment, that appellee was in the exercise of due care.

Appellant's railroad runs in a southwesterly direction from the city of Centralia and crosses the highway running north and south. On each side of the highway was a high, thick hedge, in full foliage. The south end of the hedge, on the east side of the highway, was 130 feet from the north rail of the railroad. East of the highway 230 feet, and parallel with it, was another hedge, the south end of which was within 30 feet of the railroad track. This hedge was untrimmed, dense with foliage, and 15 or 20 feet high. The hedges described obstructed the view as indicated by their location. The right of way to the east, and a train approaching from that direction, could be seen a distance of 350 or 400 feet from any point on the highway within 130 feet of the railroad on the north side, the distance beyond the east hedge mentioned increasing as the track was approached. May 20, 1905, appellee and another young man were in a wagon owned and driven by a farmer named Kingsley, who that day in town engaged the young men for work at his farm in picking berries, and with them in the wagon was on his way home. Kingsley was driving, appellee was sitting on the seat by the side of Kingsley, but facing to the rear, and Burns, the other young man, was sitting on the right or west side of the wagon, but facing the east

as the wagon approached the crossing from the north. When the horses were near the track, Burns saw the train, apprehended danger, gave the alarm, and jumped out of the rear end of the wagon. Appellee attempted to do likewise, but, as he testifies, when about to jump, the team gave a lurch forward and caused him to strike the ground between the rails, instead of north of the track as he intended, and before he could get away the engine run over and crushed his leg, which was afterwards amputated above the knee. At the time the train was first seen by Burns the horses were in a walk and the train running at the rate of twelve or fifteen miles an hour, according to the testimony of the engineer and conductor.

It is contended by appellant that the peremptory instruction to find the issues for the defendant should have been given, for the reason (1) that there is no evidence that the negligence charged was the proximate cause of the injury, and (2) that the negligence of the plaintiff was so clearly established by undisputed evidence as to bar a recovery. The rapidly moving train towards the crossing threatened destruction of the wagon and its occupants, and the direct and natural consequence of that condition was the futile attempt of appellee to escape impending danger. It is within a reasonable probability that with timely notice of the approaching train, appellee would not have been injured, and if the lack of such timely notice was due to appellant's failure to give the signals required by law, it certainly follows that the injury is the proximate result of the negligence alleged.

Appellee was a passenger in Kingsley's wagon. He knew nothing of the road and had nothing to do with respect to the course pursued or the manner of driving. We are not prepared to say, as matter of law, that in the exercise of ordinary care for his own safety he should have faced about on the driver's seat, been on the alert and more watchful of trains approaching a possible or probable crossing of the highway. At

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the very least, it way for a jury to say whether, under the circumstances, he was to be held to the kind and measure of care and caution that might be exacted of Kingsley, the driver. The negligence of Kingsley may not be imputed to appellee. West Chicago St. Ry. Co. v. Dougherty, 110 App. 204; and cases there cited. The peremptory instruction was properly refused.

We find no prejudicial error in the trial court's rulings upon evidence or instructions. The plaintiff's third given instruction is, in a measure, subject to the objection that it does not plainly confine and limit the jury to the evidence in estimating the damages, and if the verdict could be regarded as excessive there might be a point in the suggestion, that the jury misunderstood and were misled to the defendant's prejudice. But we do not so regard the verdict, and hold the error was not such as to authorize a reversal of the judgment. It is earnestly insisted by counsel and argued at length, that the verdict is contrary to the manifest preponderance of the evidence, and for this reason that the judgment should be reversed. That there is evidence in the record tending to prove every material fact alleged, we do not think may be seriously denied. That there is dispute and a sharp conflict of testimony as to whether the statutory signal was given must be conceded. That issue and other issues of fact were to be determined by the measure of credit allowed to the witnesses testifying, and this is the province of the jury. The argument is not without reason that generally greater weight should be given to positive testimony, as in this case, by appellant's witness that the bell was ringing, than to that which is called negative testimony, in which appellee's witnesses say that they did not hear it. And yet such testimony is rendered competent and admissible in this kind of case, for the very reason that ordinarily in no other way can the plaintiff establish his cause of action without calling to the stand witnesses whose natural motive and personal interest is with the defendant.

Strictly speaking, it is not negative testimony. The testimony of a witness so situated that he could have heard the bell if ringing, is to be considered and weighed by the jury in connection with all the other circumstances shown, and may be credited as against the positive testimony of other witnesses. The engineer testified that the bell was ringing continuously from the "Y" to the crossing, a distance of 1,300 feet, and the conductor that it was started to ringing as they left the "Y." Appellee, Kingsley, and two other witnesses, quite near enough and so situated as to have heard the bell if ringing, testify that they did not hear it. In any case, the positive statement of a witness, with knowledge obtained through the sense of hearing alone, that the bell was or was not ringing, means no more than that he did or did not hear it. After a careful reading of the evidence and consideration of the entire record, we are unable to say that the verdict is so manifestly against the weight and preponderance of the evidence, upon any material issue in the case, that it may be attributed to mistake, passion or prejudice on the part of the jury, and without such conclusion the verdict should stand. *Shevalier et al. v. Seager et al.*, 121 Ill. 564; *Calvert v. Carpenter*, 96 Ill. 63; *National Stock Yards v. Godfrey*, 101 App. 40.

The refusal to require appellee to file security for costs was within the reasonable discretion of the trial court, acting on the affidavits presented, and we cannot say that there was an abuse of such discretion and that appellant was prejudiced thereby in its right to a fair trial.

The judgment will be affirmed.

Affirmed.

First State Bank of Chester v. John A. Noser.

1. **ABSTRACT—*what should show.*** The abstract filed upon appeal should show a bill of exceptions signed and sealed as required by law; likewise, whether the cause was tried with or without a jury; likewise, the judgment entered, the exceptions taken and the prayer for, and the order granting the appeal. In the absence of the abstract meeting these requirements, an affirmance may be ordered *pro forma*.

2. **QUESTIONS OF FACT—*when only, are presented for review.*** In a case tried before the judge without a jury, only questions of fact are presented for review when no propositions of law were submitted and no exceptions saved or error assigned with respect to the admission or exclusion of evidence.

Action in assumpsit. Appeal from the County Court of Randolph county; the Hon. S. L. TAYLOR, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

A. G. GORDON, for appellant.

RALPH E. SPRIGGS, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

The abstract in this case is deficient and in several particulars falls short of what is required. It does not show a bill of exceptions signed and sealed as required by law; it does not appear whether or not the case was tried by a jury, nor may we learn from the abstract the court in which the case was tried, or that a judgment was entered and exceptions preserved, or that an appeal was allowed, taken and perfected. These are essential requirements, and for want of those the judgment might be affirmed. *Douglass v. Miller*, 102 App. 345; *Gibler v. City of Mattoon*, 167 Ill. 18. However, as the record is brief, we are not disposed to exercise the right accorded by the practice and affirm the judgment for want of a sufficient ab-

stract. Looking to the record we find the only question presented for review is, whether or not the finding and judgment of the trial court is supported by the evidence. No propositions of law were submitted to the trial court, and no exceptions were saved or error assigned upon the admission or exclusion of evidence, so that here the sole and only question is one of fact, and the finding of the trial court, the same as the verdict of a jury under a like condition of the record, must be held conclusive of the facts in controversy, unless we can say that the judgment is so manifestly against the weight and preponderance of the evidence as to indicate prejudice, passion or mistake on the part of the court who heard the evidence. We find nothing in the argument of counsel for appellant addressed to this, the only point in the case, and only by a liberal intendment may we even consider the question at all, for it is not assigned as error that the verdict or finding is against the manifest preponderance of the evidence. It will not be necessary to prolong this opinion, for to our mind there is abundant evidence to establish appellee's defense.

O. A. Orvis, a grain buyer of St. Louis, Missouri, in business under the name of "The Orvis Grain Company," engaged appellee to buy and ship corn for him on commission. Such is the testimony of appellee and it was for the trial court to determine the weight and creditability of this evidence. By correspondence it was arranged, between Orvis and appellant, that drafts, by appellee on Orvis (the grain company) with bill of lading attached for corn shipped, would be paid to appellee on presentation, and to secure these payments by appellant, Orvis deposited \$350. Under and in accordance with this arrangement, appellee bought and shipped corn for Orvis, made drafts on the grain company from time to time, with bill of lading attached, and was paid or credited by appellant for the sum. In this way the business continued for several months, the drafts being paid to appellee by appellant, who

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was paid or reimbursed by the grain company. Finally the two drafts in controversy were drawn as usual, paid by appellant and forwarded to the grain company and payment by it refused, and this suit was instituted to recover from appellee the money paid by appellant. The general rule which obtains in commercial law, and as declared by statute, that the drawer of a bill of exchange is liable on refusal of the drawee to pay, is obviated in this case by the special contract, arrangement and understanding between the parties to the transaction. There is evidence in the record to warrant the court's finding that the payment of the drafts to the appellee was in pursuance of a contract between the parties by which appellant was to advance the money for the purchase of corn and look to the grain company alone for reimbursement. In the light of the correspondence, the manner of doing business, and the contractual relation of the parties in the beginning, we cannot say that such inference and conclusion are unreasonable and unauthorized. Unable to so declare, the judgment must be affirmed.

Affirmed.

Thomas A. Elliott v. The Egyptian Power Company.

1. **EVIDENCE**—*what essential to preserve rulings upon, for review.* To entitle a party to the right to have exceptions and rulings on the admissibility of evidence reviewed on appeal, there must be a motion for a new trial, a refusal to grant the same, and an exception to such ruling.

Action in assumpsit. Appeal from the County Court of Williamson county; the Hon. RUFUS NEELY, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

GEORGE W. YOUNG, for appellant.

E. E. DENISON and F. W. RAYMOND, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is an action in assumpsit on special contract, brought by appellant against appellee in the County Court of Williamson county. Issues were joined and the case tried by jury. At the conclusion of plaintiff's evidence, the court instructed the jury to find the issues for the defendant. On the trial of the case, and in the offer of evidence in proof of the alleged agreement, it developed that a writing had been signed by the plaintiff, and this being produced the court ruled that evidence in proof of a verbal agreement was inadmissible and excluded further testimony in that line. This writing purports to be a release and compromise settlement of all claims by plaintiff against the defendant for injuries sustained in the accident of May 5, 1904, and properly was matter to be set up in defense. It was offered by the plaintiff, and the question whether or not the court erred in excluding testimony as to the consideration for the release, is not before us to decide, for the reason that it was not first submitted to the trial court by motion for new trial, with exception preserved by bill of exceptions, to an adverse ruling of that court upon such motion. The peremptory instruction, of which complaint is made, was based upon the evidence then in the record, and without evidence of a contract or of a consideration promised, other than that expressed in the release, there was no evidence on which to submit the case to the jury, and the court could not do otherwise than instruct for the defendant. To entitle a party to the right to have exceptions to rulings on the admissibility of evidence reviewed on appeal, there must be a motion for a new trial, a refusal to grant the same and an exception to such ruling. *C., B. & Q. R. R. Co. v. Haselwood*, 194 Ill. 69; *Jones v. City of Spring Valley*, 108 Ill. App. 492. In *Call v. The People*, 201 Ill. 500, it is said: "The rule is well settled in this state that where there has been a

trial by jury, the errors relied on for a reversal in this court must have been first called to the attention of the trial court by motion for a new trial and an opportunity given that court to correct the same." In this statement of the rule is seen the reason for it, namely, that the party complaining must first exhaust his right in the trial court before he may be heard in an appellate court. It is his right in the trial court to have the errors assigned upon the rulings respecting the admissibility of evidence and other incidents of the trial, reviewed by that court upon a motion for new trial, and until he avails himself of that right the court of appeal will not take cognizance. It does not appear in this record that there was a motion for a new trial, or that an exception to the judgment was preserved and shown by the bill of exceptions,—a condition requiring affirmance of the judgment by this court. The abstract is deficient, and for the most part subject to the criticism made by appellee, but as the record is short and as there is other remedy for non-compliance with the rule requiring a complete abstract, we are not disposed to make that a reason for affirming the judgment. For other reasons, already stated, and because there was no evidence in the record tending to prove the plaintiff's cause of action, we are constrained to hold, that the County Court did not err in giving the peremptory instruction to find for the defendant. The judgment will, therefore, be affirmed.

Affirmed.

**American Insurance Company v. Egyptian Lodge
No. 802, I. O. O. F.**

1. **INSURANCE POLICY**—*how defenses in suit upon, should be pleaded.* In a suit upon an insurance policy, as a rule, defenses based upon conditions broken should be especially pleaded and evidence in support of such defenses is not admissible under the general issue alone.

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2. INSURANCE POLICY—*how defense of breach of condition by change of ownership should be pleaded.* Such defense can only be relied upon at the trial when it has been interposed by special plea.

3. INSURANCE POLICY—*how construed with respect to description of property, etc.* With respect either to the description of the property insured or to the meaning and application of the terms and conditions of the policy, the courts in construing an insurance policy will endeavor to effect the purpose and intent of the parties.

4. INSURANCE POLICY—*when company cannot complain of description contained in.* Where the description of the property insured as contained in the policy was written by the agent of the company without suggestion from the insured, the company may not complain of the terms thereof.

Action in assumpsit. Appeal from the County Court of Union county; the Hon. MONROE C. CRAWFORD, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

JAMES LINGLE, for appellant.

P. E. HILEMAN and TAYLOR DODD, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

Appellee recovered judgment against appellant at the January term, 1906, of the Union County Court, in the sum of \$800, in a suit on an insurance policy, for loss by fire occurring October 20, 1905, the property destroyed being a second story of a building and the contents therein. The policy bears date January 2, 1904, and was written by H. P. Tuthill, acting for his son Russell Tuthill, the defendant's agent. Five years before, H. P. Tuthill, as agent for the German Insurance Company, wrote a policy in like sum for appellee covering this same property. When the policy in the German Insurance Company expired, Russell Tuthill was agent for appellant, and, without application or direction from appellee, caused the property to be insured with appellant company. Appellee was notified and paid the premium, but the policy was never called for and remained in the hands of Tuthill, the

agent. It does not appear in evidence that appellee ever saw the policy prior to the fire. The contract of insurance, as it appears in the policy, is as follows:

“The American Insurance Company of Newark, N. J., in consideration of thirty-two dollars premium, does insure Egyptian Lodge 802 for the term of five years from the second day of January, 1904, noon, to the second day of January, 1909, at noon, against all immediate and direct loss or damage by fire, lightning, wind storms, cyclones and tornadoes, except as hereinafter provided, to an amount not exceeding eight hundred dollars, to the following described property while located and contained as described herein and not elsewhere, to wit: \$600 on their interest shingle-roof main church building and lodge and all permanent fixtures, (excluding pews, pulpit and other fixtures) fresco and decoration work, steam, water and gas pipes, lighting and ventilating and stationary heating apparatus, and stained glass, situated Sec. 19, T. 12 I. E., Union county, Illinois, their interest being the entire second story of said building, \$200, on lodge furniture and fixtures, paraphernalia and lodge supplies, including printed books, music, maps, charts and fuel, on pipe organ and appurtenances, cabinet organ and piano, all while contained in the above described church building and lodge.”

Among other conditions affecting the liability of the company it is provided that “if any change takes place in the title, possession or interest of the assured in any of the above mentioned property, or if the assured shall not be the sole and unconditional owners in fee of said property, both at law and in equity, this policy shall be null and void.” It is further provided that “any fraud or attempt at fraud, or false swearing on the part of the assured, either in his proofs of loss or otherwise, shall cause a forfeiture of all claims under this policy.” At the time of the fire appellee was in possession of the premises destroyed, under a lease from the Cumberland Presbyterian Church. The lease

was dated and executed August 15, 1893, and demised to appellee the second story of the church building for the period of ninety-nine years, the lessee to pay rent, paint the church, maintain the roof, furnish and keep in repair the hall which was the second story. The hall was occupied and used by appellee for lodge purposes and in it was kept the furniture, properties, paraphernalia, etc., usual and incident to this purpose.

The declaration is in assumpsit, to which appellant filed the general issue. The grounds of defense relied upon in the trial and contended for here are (1) that appellee was not the sole and unconditional owner of the property; (2) that there was a change of interest or possession of assured in the property, and (3) that there was false swearing in making the proof of loss. Complaint is made of the trial court's rulings in the admission and exclusion of evidence, of instructions given, refused or modified, and that the verdict is contrary to law and against the weight of the evidence. In a suit upon an insurance policy, as a rule, a defense based upon conditions broken should be specially pleaded and evidence in support of such defense is not admissible under the general issue alone. But in the trial of this case appellee introduced evidence in chief to prove compliance with the conditions and thus enlarged the issues made by the pleading and opened the way for admission of appellant's evidence in defense. The proof as to change of possession did not "incidentally creep in," as stated in argument, but was brought into the trial and made an issue by appellee.

The purpose of a contract of insurance is indemnity for loss suffered. Such must be held to have been the purpose and intent of the parties to the contract on which this suit was brought. To assume otherwise would discredit the motive of appellant. It was for this the premium was paid and the policy issued. A loss of the property insured having occurred, liability of appellant attaches, unless by some act in violation of the express terms or conditions of the policy-con-

tract appellee has forfeited its right to the indemnity promised. So far as a question of construction is involved, either as to the description of the property insured or as to the meaning and application of the terms and conditions relied upon in defense, the courts will endeavor to so construe the contract as to effect the purpose and intention of the parties. This is a rule of general application in the construction of contracts and in reason and justice especially to be observed in determining the rights of parties under insurance contracts. In this case appellant's agent wrote the policy, and by it insured appellee's *interest* in the second story of the church building. That interest was a leasehold, and in effect so stated in the policy, for it was limited to the second story which cannot be taken and held in fee, because that is in the land upon which the building stands. The condition that the assured shall be the sole and unconditional owner in fee, is without application as not relating to the property insured. The description of the property insured is as it was written by appellant's agent, without direction or suggestion from appellee, and appellant may not complain that it is not as clear and definite as it might have been. We think it quite sufficient to warrant the construction here given, and, under all the circumstances, there can be no doubt of the intention and understanding of both parties as to the appellee's interest in the property. In answer to special interrogatories, submitted by request of appellant, the jury found there was no change of possession or interest in the property. This finding was fully justified by the evidence. The most that may be claimed under the testimony is that appellee agreed to enter into a contract with the Modern Woodmen by which one-half interest in the property would be leased or assigned. But it does not appear that such contract was ever executed or that the half interest in the property was in fact assigned or transferred. Unless the Modern Woodmen held the property and possession thereof by

virtue of a valid and binding agreement with appellee, and this we think the evidence fails to show, they were without title, and their possession and use of the lodge room and furniture was merely by sufferance, or at most as subtenants, whose possession was that of appellee. This would not affect appellee's rights under the policy.

The jury also returned a special finding that the plaintiff was not guilty of false swearing. That issue was fairly submitted to the jury and their verdict is conclusive.

The jury were properly instructed as to the measure of damages (appellee's instruction No. 26 and appellant's modified No. 8), and the court's rulings on the trial, in the admission of evidence pertaining to damages, was in harmony with these instructions. Under the weight of the evidence the damages are not excessive. As already indicated, we are of the opinion that a fair construction of the language used in the policy bound the appellant to an insurance of the appellee's building, and from the language used in description appellant must be held to have known that appellee's interest was that of lessee. There was then no question of notice for the jury to try, and whatever errors may have been committed on the trial in the evidence, or instructions upon that question, they were harmless and need not be further considered. We do not find prejudicial error affecting appellant's rights in the trial of other and material questions submitted. The judgment of the County Court will, therefore, be affirmed.

Affirmed.

McFaddin v. Ferrell.

Mary L. McFaddin et al. v. H. V. Ferrell, Administrator.

1. **LIFE ESTATE**—*when superior to claims of creditor.* A widow, taking a life estate by will, holds the same as a purchaser, where it does not exceed in value what she would have taken by law had she renounced under the will, and such estate is, therefore, superior to the claims of creditors.

2. **SALE OF REAL ESTATE TO PAY DEBTS**—*when not proper.* Where the property of an estate is encumbered by dower and homestead substantially to its full value, it is not necessary, or even proper, for an administrator to sell the premises subject to the encumbrance.

Proceedings to sell real estate to pay debts. Appeal from the County Court of Jackson county; the Hon. W. F. ELLIS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

WILLIAM W. CLEMENS, for appellants.

WILLIAM A. SCHWARTZ, for appellee; COLP & FERRELL, of counsel.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This was a proceeding in the County Court, by appellee, as administrator *de bonis non* of the estate of John Linehan, deceased, to sell real estate to pay debts. It appears from the petition and evidence that John Linehan died April 27, 1884, leaving a widow, Maria Linehan, and three daughters, Mary L. McFaddin, wife of David McFaddin, Jennie Bevard, wife of G. W. Bevard, and Maggie Linehan, since deceased. By his will John Linehan devised his estate, subject to the payment of debts, to his wife for life with remainder, on death or marriage of his wife, to his three daughters, the two survivors of whom are the appellants herein. The widow Maria Linehan was duly appointed executrix May 24, 1884. There was no appraisement of personal property or widow's award estimated. An inventory was filed June 30, 1884,

showing the estate to consist of lot 303, Carbaugh's second subdivision of outlet 52 in Carbondale, subject to a mortgage of \$400, and personal property valued at \$140. The widow continued to reside upon the lot inventoried, and now in controversy, until her death, April 21, 1901. It does not appear that she ever made report or settlement as executrix, or that she was discharged by the court. On the 19th day of July, 1887, the claim of Adah Malloy, administratrix of the estate of John Malloy, deceased, was allowed against the estate of John Linehan, deceased, for the sum of \$397.50, and to enforce the payment of this claim, with interest added, amounting to \$760.20, is the purpose of this proceeding. Appellants answered the petition, denying that the claim of Adah Malloy as administratrix was ever probated or allowed, denying the insolvency of the estate, and that sufficient reason is set up in the petition or shown by the evidence for the long delay, and insisting that the claim is barred by the lapse of time, since it might have been prosecuted and collected many years ago. Upon hearing the court found in favor of appellee and rendered a decree in accordance with the prayer of the petition, from which an appeal was taken and errors duly assigned in this court.

That the lot in question was homestead property in John Linehan at the time of his death, and that the widow continued to occupy it as a residence until her death, is not disputed. And that it was not of certain or substantial value in excess of \$1,000 at any time during the life of the widow, we think was clearly established by the evidence. It is insisted by appellant, however, that the widow, not having renounced under the will, waived her homestead and dower in the premises and took a life-interest as devisee, and this being her only title and right, her interest in the lot was subject to the payment of debts which might and should have been enforced by a sale of the premises. This contention is not tenable. It has been announced as

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the rule, by the Supreme Court, that where the provision made in a will is not in excess of what the widow would take without the will, if she elects to take under the will, she will take, not as a beneficiary, but as a purchaser. A provision in a will in lieu of dower and homestead is, in fact and legal effect, a mere offer of the testator to purchase out the dower and homestead interest for the benefit of his estate. *Carper et al. v. Crowl et al.*, 149 Ill. 465. "The real estate devised to her in fee will be considered in equity as representing her dower in all the testator's real estate and exempt from the payment of his debts as well as her homestead." *Richie v. Cox*, 99 App. 369. Under the doctrine of the cases cited, the widow held by purchase a life-estate in the premises superior and prior to any claim afterwards probated against her husband's estate. We think the evidence sufficient to warrant the finding by the County Court, that the claim of Adah Malloy, administratrix, was duly probated and allowed. So far as the record discloses, there was but one petition filed for the allowance of a claim, and that was April 18, 1887, by Adah Malloy, administratrix. The case is docketed and entitled, "In the estate of John Linehan, deceased." "Petition for allowance of claim." The cause was continued from the April to the June term, and again continued until July 18, 1887, when a hearing was had pursuant to the last continuance (the title as first docketed being preserved throughout), and was concluded the following day, July 19, 1887, with a judgment for the "plaintiff, claimant" against the estate of John Linehan, deceased, for the sum of \$397.50. Read as a continuing record from the filing of the petition, in which the name of claimant is given, there can be no reasonable doubt from the record itself as to whom this allowance was made.

It is established law in this state, that where the property of an estate is encumbered by dower and homestead substantially to its full value, it is not

necessary or even proper for an administrator to sell the premises, subject to the encumbrance. The sale may be postponed until the encumbrance is extinguished, when the administrator may proceed to subject it to payment of debts. *Wells v. Lanham, Exctr.*, 189 Ill. 326; *Graham v. Brock*, 212 Ill. 579; *Thomas, Admr. v. Waters*, 122 Ill. App. 434; *Frier, Admr. v. Lowe et al.*, 119 App. 246. As was said in the *Thomas* case, *supra*, the debt, for which the sale is asked, appears to be a just claim duly allowed by the Probate Court, and no rights of third parties intervening, it seems just and equitable that it should be paid notwithstanding the lapse of time, and that the defendants, revisionary devisees, may not complain of the unavoidable delay.

The judgment will be affirmed.

Affirmed.

**Illinois Terminal Railroad Company v. Martha L.
Chapin, administratrix.**

1. FELLOW-SERVANTS—*who are*. The servants of a common master, whose usual duties bring them into habitual association so that they have opportunity and power to influence each other to the exercise of caution, are fellow-servants within the law.

2. FELLOW-SERVANTS—*how question as to who are, to be determined*. It is for the court to define the relationship of fellow-servants and instruct the jury as to the facts necessary to establish that relationship in a given case, and where there is conflict of evidence as to such necessary facts embodied in the definition, the question is then for the jury. But if the facts admitted or proven beyond dispute, show the relationship to be within the definition given by the court, then the question becomes one of law.

Action on the case for death caused by alleged wrongful act. Appeal from the City Court of Alton; the Hon. JAMES E. DUNNEGAN, Judge, presiding. Heard in this court at the February term, 1906. Reversed, with finding of facts. Opinion filed September 14, 1906.

HENRY S. BAKER and WARNOCK, WILLIAMSON & BURGHS, for appellant.

THOMAS F. FERNS, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

Appellee, as administratrix, brought suit against appellant to recover damages for the death of Addison G. Chapin, alleged to have been caused by the negligence of appellant. The declaration consists of one count, by which it is alleged that on January 24, 1905, the plaintiff's intestate was in the defendant's employ as a fireman on an engine drawing a passenger train over defendant's railroad; that it was the defendant's duty to keep its tracks in a safe condition for travel; that a certain other engine operated by defendant was negligently left near and upon the track over which the said passenger engine and train was running, causing a collision by which plaintiff's intestate was killed. It is alleged that deceased was in the exercise of due care and that he was not the fellow-servant of the engineer in charge of the other engine. Defendant filed the general issue, and upon trial had, the jury returned a verdict for the plaintiff for \$5,000. A motion for a new trial was overruled and judgment rendered on the verdict. The defendant appealed. At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence, defendant asked for a peremptory instruction to find for the defendant. The peremptory instructions were refused, exceptions preserved and error duly assigned.

Appellant company owns and operates a railway between Alton and Edwardsville, a distance of about fifteen miles. Appellant's switch-yard, through which the main track runs, extends from the Alton station eastwardly to a point called Federal. The roundhouse, in which all the engines in use by appellant were housed every night, is situated within or near the switch-yards, and was provided with the usual track and switch connections for the movement of engines into and out of the roundhouse upon the various tracks

in the yards. The main track runs through the yard. West of the roundhouse a track known as No. 2 runs parallel with the main track, and cars upon track No. 2 obstruct the view of engineers operating over the track leading from the main track to the roundhouse. The engineer and fireman of the several engines housed at the roundhouse came together every evening as they turned in from work, and again every morning as they went out with their respective engines, passing over the same switches and tracks, each crew operating the engine in charge with reference to the movement of other engines in charge of other crews. At 7:10 a. m. on the day of the accident, appellee's intestate, with engineer McGee, was due to leave the station at Alton with train No. 60, consisting of an engine and combination passenger and baggage car. He and McGee went to the roundhouse and with their engine proceeded to the station which they left on time with the train for their run to Edwardsville. After they left the roundhouse the engine for No. 8, engineer Mahoney, started out to take up a work train which, by orders received the evening before, was to be operated as an extra from 7:00 A. M. to 7:00 P. M. between Alton and the Illinois Terminal Junction, a station on appellant's road. The tracks were slippery that morning and preparatory to moving No. 8, a heavy train, and before coupling on, Mahoney moved his engine down the road toward the main track in order to sand the rails, and in doing so, backed his engine very near to or partly upon the main track, where it was struck by No. 60, running at the rate of 25 or 30 miles an hour. In the collision appellee's intestate was killed.

From the undisputed evidence in this record we are constrained to hold that appellee is without cause of action and that the trial court erred in refusing the peremptory instruction to find the defendant not guilty. Clearly within the fellow-servant doctrine, as applied in this state, Chapin, McGee and Mahoney

were fellow-servants, and whether the injury may be attributed to the negligence of McGee, engineer of No. 60, or to Mahoney of No. 8, or to the negligence of both combined, the appellant was not liable, and under the facts and the trial court should have so ruled. Though train No. 60 was operating under an order from the train dispatcher, and had a "clearance card" for the run from Alton to Edwardsville, it further appears from the undisputed evidence that within the switch-yards all trains and engines must be moved "expecting to find the track obstructed." This was a rule of the company for the practicable operation and safety of trains in the yards and was known and understood by all the employees brought to the witness-stand in the trial of the case. Under the rule referred to and the manner of operation within the yards, as it appears from the evidence, the relation between the several engine crews was in all respects the same as that of different switching crews operating within the same yards. While within the yard limits, under the rule stated, the crews of No. 60 and No. 8 were fellow-servants, as defined by the Supreme Court in *Chicago City Railway Co. v. Leach*, 208 Ill. 198, for they were "co-operating at the time of the injury in the particular business in hand," and from the very nature of their business, the moving of trains in and through the switch-yard, their usual duties brought them "into habitual association so that they would have the opportunity and power to influence each other to the exercise of caution." It is said in the *Leach* case, and other cases there cited, by the court, that "what facts will create the relation of fellow-servant between employees of a common master is a question of law, and whether such facts exist is, ordinarily, a question of fact to be submitted to a jury." In other words, it is for the court to define the relationship of fellow-servants and instruct the jury as to the facts necessary to establish that relationship in a given case, and where there is conflict of evidence as to such necessary

facts, embodied in the definition, the question is then for the jury; but if the facts admitted, or proved beyond dispute, show the relationship to be within the definition given by the court, it then becomes a question of law. *Hartley v. C. & A. R. R. Co.*, 197 Ill. 440. In the case last cited, it is said: "It has long been the settled rule of this court that the servants of a common master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, must be directly co-operating with each other in the particular business, so that their usual duties bring them into habitual association, so that they exercise a mutual influence upon each other promotive of proper caution," thus stating in precise terms the fellow-servant doctrine in both its branches as the same obtains and is applied in this state. Chapin, appellee's intestate, was injured through the negligence of McGee, engineer of No. 60, or Mahoney, engineer of No. 8, or of the combined negligence of both. That both engineers were fellow-servants of deceased under both branches of the rule clearly appears from the undisputed evidence in the case. At the time of the injury they were directly co-operating with each other in the particular business of moving trains or engines within the limits of the switchyard "expecting the track upon which they were moving to be obstructed." The moving of the engines and trains within the yards was the business in which the several crews were engaged, and in the performance of the duty for which they were employed, under the rules adopted by the company, each crew was to operate the movement of its engines in connection with and in reference to every other engine crew. The fact that No. 60 was a regular first-class train, running on schedule with a clearance card, did not affect the relationship between the engine crews, for it is not disputed that all trains, while operating within the yards, were subject

to the same rule respecting their movements. The duty of appellant to provide a clear track and a safe way for the trains did not arise until the yards were cleared. The usual daily duties in the movement of engines in and out of the roundhouse, and upon the tracks within the switchyard, brought the crews together, in habitual association, so that the deceased and the engineers whose negligence caused the injury, might each exercise an influence upon the others. According to the evidence, the several crews, operating engines for the appellant company, were not only together and to a considerable extent personally associated, morning and evening, at the roundhouse, where the engines were stored nightly, but with respect to the different engines in use they performed the duties interchangeably. It is difficult to conceive of a case in which the facts more clearly establish this "habitual association" part of the fellow-servant rule, and there being no dispute of the facts it was the duty of the court to hold, as matter of law, that appellee's intestate was injured by the negligence of a fellow-servant, and that an action for damages would not lie. The judgment of the Circuit Court will therefore be reversed, and as no recovery may be had under the findings of this court the cause will not be remanded.

Reversed.

We find as facts, to be incorporated with the judgment, that the injury complained of was caused by the negligence of fellow-servants of appellee's intestate, and that the injury sustained was within the risk assumed by appellee's intestate under his employment as a servant by appellant.

**American Car & Foundry Company v. William Hill, by
next friend.**

1. NEGLIGENCE—*special demurrer essential to determine whether charge of, sufficiently specific.* A special demurrer is essential to raise the question as to whether the negligence urged is sufficiently alleged by being charged against the corporation defendant without averring that it was so negligent "by its servants and agents."

2. CHANGE OF VENUE—*only one, will be allowed by virtue of statute.* Only one change of venue can be had and the granting of one application precludes the allowance of another.

3. CHANGE OF VENUE—*when complaint as to judge presiding at trial after granting of, will not be sustained.* Where the judge called in to try the cause was qualified under the law, the fact that there was another judge of the same circuit or judges of other circuits who might have been called in, does not affect the jurisdiction of the court to hear the cause.

4. CONTINUANCE—*when affidavit presented upon application for, defective.* An affidavit for continuance is defective in not stating in what manner the presence of a witness in court could be of assistance to counsel, other than as a witness, where the presence of such witness in addition to his testimony was made the basis of the application.

Action on the case for personal injuries. Appeal from the Circuit Court of Madison county; the Hon. JAMES E. DUNNEGAN, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

ALEXANDER W. HOPE, for appellant.

J. M. BANDY and KEEFE & SULLIVAN, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

Appellant owned and operated a manufacturing plant in which were constructed railroad cars. A part of the plant consisted of a large shed, 400 feet long, 200 feet wide, and 20 feet high. The frame was made of heavy upright posts arranged in rows across the building, connected together by heavy timbers or sills—the rows of posts being about 20 feet apart—and

each post with its connecting timbers formed what is called a bent. The shed had been sided with old material and covered with a tar-paper roof. For several days prior to the injury complained of, appellant had been engaged in tearing down—wrecking—this building, and when appellee was put to work at the place where he was injured the roof and siding had been entirely removed and only the skeleton or frame-work remained. Tar-paper from the roof, boards and other debris was scattered over the ground throughout the building, and appellee, with others, was directed to gather up this refuse material, load it on a truck and wheel it away. Appellee was between sixteen and seventeen years of age and, at the time of his injury, had been in the employ of appellant for nine months as an errand boy and in taking the numbers of car-wheels, as they were moulded, a duty appertaining to the shipping department. He was a member of the shipping gang, under the direction of a foreman named Howard. On the day of the injury Howard directed appellee to work with other men under Deitz, another foreman, engaged in removing the debris scattered over the floor or ground of the shed. While appellee was at work with the other men in the southwesterly part of the building, the wrecking gang began at the southeasterly corner (200 feet away) to take down the frame-work. The wrecking gang was under foreman Kenner. The wrecking gang began at the corner, intending to take down one bent at a time. Each tier of bents was fastened to the next tier north by stringers or cross-ties, the whole series of bents being so arranged that when the southeasterly bent was detached, it caused not only the entire south tier of bents to fall, but also brought down two tiers north, causing the fall of almost one-fourth of the entire frame-work of the building. Appellee was severely injured by the falling timbers. Suit was brought in an action on the case for damages, tried by a jury, which found for the

plaintiff for \$1,999, upon which judgment was rendered, and from which defendant appealed.

The declaration contains one count, which alleges that plaintiff was employed by defendant and was inexperienced in the line of work to which he was put; that it was "the duty of defendant to see that the place where plaintiff was required to work was in a reasonably safe condition, and to use ordinary care to avoid subjecting plaintiff to peril not obvious to the employe and which was unknown to him." It then alleged that the defendant negligently detached and pulled down certain pieces of timber in such manner as to cause timbers to fall upon the plaintiff, injuring him.

The first contention by appellant is, that the action being against a corporation and so alleged, that the averment of negligent acts by the defendant is not sufficient, and that it should have alleged that the negligent act was done by the agents or servants of defendant. Whatever there is in this point, or other objections based upon the sufficiency of the declaration, is cured by verdict. The defendant, and not its servants, is charged with negligence, and if more specific averment as to the servants or agents by whom the act was done, were required, a special demurrer might have been interposed. Nor was it necessary, under this form of allegation, to further aver that the other servants of defendant were not fellow-servants of the plaintiff. *Libby v. Sherman*, 146 Ill. 540, is a case in point and conclusive of appellant's contention respecting the declaration and the relevancy of the evidence admitted thereunder. We quote from the opinion, page 548: "They (the allegations of the declaration) are that the defendant, that is, the corporation itself, negligently, did the acts complained of, allegations which exclude, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible." At most, as stated by the court in *Mott v. Chicago M. El. Ry. Co.*, 102 App. 416, where

a like contention was urged: "We are of opinion that the original declaration is a defective statement of a cause of action" and will not affect the verdict. Under a declaration, by one servant, in which it is alleged that the injury is due to the negligence of another servant, as in the case of *Joliet Steel Co. v. Shields*, 124 Ill. 213, and *Chicago Ry. Co. v. Leach*, 208 Ill. 198, relied upon by appellant, the plaintiff must aver and prove that the relation between him and such servant was such as to render the master liable for the latter's negligence; but where it is alleged, as in this case, that the injury is due to the negligence of the defendant, no such averment is required, and as to the liability we look only to the evidence. *Libby v. Sherman*, *supra*; *Cribben v. Callaghan*, 156 Ill. 553.

Appellant's counsel complains bitterly that on application for change of venue, Judge Dunnegan of the City Court of Alton, instead of the one remaining qualified circuit judge, was called in to try the case. The application was made on the day before the case was set for trial. The prayer of the petition was granted and Judge Dunnegan called in. No objection was then made by appellant's counsel who was present. The next day, when the case was called for trial, a second application for change of venue was made upon like grounds as the first, viz., the prejudice of the judge. The motion was properly denied for the reason, that the statute allows but one change of venue. The only effect of granting the change of venue on the application in this case was to disqualify two of the circuit judges named in the petition, and in doing this appellant exercised and exhausted his right under the statute respecting his choice of venue or of the judge who may preside at the trial. The case was tried in the Circuit Court, where it was pending, by a judge qualified under the law, and the fact that there was another judge of the same circuit, or judges of other circuits, who might have been called in, does not affect the jurisdiction of the

court, and so far as disclosed by the proceedings, appellant's right to a fair trial was not prejudiced by what was done. We think the case of *C. & A. R. R. Co. v. Harrington*, 192 Ill. 18, cited by appellant, is in point and against appellant's contention. Under the doctrine of that case, the necessity for passing upon the first motion for change of venue could have been obviated by calling in Judge Dunnegan. If this may be done before motion granted, there is no reason why it may not be done afterwards, and as therein stated, "this arrangement, the calling in of an outside judge, rendered a change of venue unnecessary." It was held in *Stringham v. Parker*, 159 Ill. 304, that the presiding judge, from whom a change of venue is taken on the ground of prejudice, is to determine to what county the case shall be transferred; and if to what county, may he not within the exercise of a judicial discretion, as in all other cases for trial, call in another judge? The fact that there was another circuit judge of that circuit who was qualified to try the case in no wise affected the legality of the trial by Judge Dunnegan. The affidavit in support of appellant's motion for a continuance was defective in not stating what was expected in the testimony of the absent witness Deese, nor in what manner his presence in court could be of assistance to counsel, other than as a witness. For this reason the court might have denied the motion. Nevertheless, the affidavit was admitted and read in evidence and appellant had the benefit of the affiant's conclusions as to facts, as though the absent witness would have sworn to them, and may not therefore complain. We do not think the court abused its discretion or that appellant was prejudiced by denying the motion.

We find no substantial error in the court's rulings upon the testimony, nor the giving, refusing or modification of instructions. As already stated in this opinion, the declaration alleges a cause of action in terms and by averments sufficiently comprehensive to

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admit the evidence offered in support. There was evidence tending to prove all the material allegations of the declaration, and unless there was substantial prejudicial error in the proceedings, the verdict is conclusive of the facts and must stand. Whether appellant was negligent in the manner of taking down the building, whether appellee was in the exercise of due care for his own safety, or, with knowledge of the dangers, assumed the risk, whether the injury received was caused by appellant's negligence, as charged, the extent of it and amount of damages to be assessed, were all questions properly submitted to the jury under the evidence in this case. Under the facts and circumstances shown by the evidence we do not think the fellow-servant doctrine is involved, nor is that of assumed risk, as applied in the case of Clark and Loveday v. Liston, 54 App. 578. The judgment of the Circuit Court will be affirmed.

Affirmed.

Swift & Company v. George A. Rennard, by next friend.

1. UNLAWFUL EMPLOYMENT—*what does not bar minor's right to recover for personal injuries sustained while assigned to.* The fact that the minor in question may have concealed his age, does not necessarily bar him of the right to recover for personal injuries suffered while assigned to an unlawful employment, but such fact is a circumstance which may be considered by the jury in weighing the testimony of such minor.

2. STEAM MACHINERY—*what not, within meaning of section 11 of Child Labor Act.* A meat hasher held not "steam machinery" within section 11 of Child Labor Act.

3. INSTRUCTIONS—*must be predicated upon evidence.* Instructions given to the jury must be predicated upon evidence in the cause.

4. INSTRUCTIONS—*when should define phrases.* A phrase, such as "proximate cause," though having a well understood meaning to the profession, should, when contained in an instruction to a jury, be defined so that it may be understood by them.

5. ARGUMENT OF COUNSEL—*what improper*. Argument of counsel containing the following language, held prejudicial: "The difference between the plaintiff and the defendant was that the plaintiff had a soul and was responsible before Heaven for the truth of what he said, while the defendant was a corporation without a soul to answer hereafter," etc.

6. ARGUMENT OF COUNSEL—*what does not cure improper*. A mild rebuke does not remove the effect of improper argument of counsel.

Action in case. Appeal from the City Court of East St. Louis; the Hon. W. J. N. MOYERS, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

A. & J. F. LEE and C. E. POPE, for appellant.

GEORGE A. CROW and WEBB & WEBB, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is an action in case brought by appellee, a minor, against appellant, a corporation, to recover for personal injuries received by him while in the employ of appellant in alleged violation of section 11 of the Child Labor Act, approved May, 1903. The suit was brought to the December term, 1903, of the City Court. It was tried resulting in a verdict and judgment for appellee for \$7,000, from which an appeal was taken to this court and the judgment was reversed (119 App. 173). The cause was remanded and again tried upon an amended declaration consisting of two counts, in substance as follows:

The first count alleges that the defendant on the tenth day of October, 1903, operated a manufacturing establishment and was engaged in the butchering and meat packing business and unlawfully employed appellee, who was then under the age of sixteen years, and put him to operating steam machinery, to wit, a meat grinder; and that while appellee was operating said machinery his right arm came in contact with certain parts thereof and was so injured as to require amputation.

The second count alleges the unlawful employment of appellee who was under the age of sixteen years and that appellant put him to work "that may be considered dangerous to his life or limbs," to wit, operating a grinder, and that while operating said machinery he received the injuries complained of. In each count it is alleged that the unlawful employment caused the injuries received, and the damages are laid at \$15,000. The jury found for appellee and assessed his damages at \$15,000. The court denied appellant's motion for a new trial, required a *remittitur* of \$3,000 and then entered judgment on the verdict, from which an appeal was prayed, allowed and perfected to this court. In brief we restate the facts substantially as on former hearing. At the time of the injury, appellant, a corporation, was engaged in operating a slaughter house and packing plant, and among other appliances had in use a machine known as a meat hasher or liver hasher, constructed with a revolving cylinder provided with knives so arranged as to cut, grind and force the meat through the machine to the floor or receptacle beneath. Appellee was employed in an adjoining department in the work of removing sinews from the feet of slaughtered cattle. The drinking water for the use of employees working in appellee's department was kept in a keg near the door opening to the department where the meat hasher was operated. Appellee testifies that he went to get a drink of water and looking through, or from the door, observed that the ground meat or liver coming from the machine was running over the sides of the truck to the floor and that he called the foreman's attention to it; that the regular operator there then moved the loaded truck to the drying coils in another part of the room, and that the foreman ordered him, the appellee, to feed or run the machine until the operator returned; that in obedience to this order he commenced to feed the machine and threw a piece of liver into the hopper which, being too large and not readily taken by the revolving knives, he

pressed it down with his hand which was caught and drawn into the machine, causing the loss of his hand and arm.

The right of appellee to maintain an action in this case depends upon the credit to be given to his unsupported, uncorroborated testimony that O'Neil, the foreman, ordered him to operate the meat hasher during the temporary absence of Cuchinsky, the regular operator. Appellee is contradicted by the positive testimony of O'Neil and Lynch and by his own testimony given at a former trial. The evidence tends to prove that he secured employment of appellant by false representations or the wrongful concealment of the facts as to his age, and while this may not bar his right to recover, yet it is a circumstance duly to be considered in weighing his testimony as a witness. The most that may be said of this record is that there was a sharp conflict of evidence upon the vital question whether or not an order was given, and any substantial error in the proceedings by which the verdict was obtained will be held as prejudicial and require a reversal of the judgment. Upon three propositions argued this court is committed adversely to the contention of appellant. In this case on former appeal we held that if the foreman ordered appellee to operate the meat hasher and that he was injured while acting in obedience to such order, this would be an employment within the meaning of the statute to operate that machine, notwithstanding his regular employment and rightful place pursuant thereof was in another department. We held furthermore, that the meat hasher, the machine in controversy, was within the intent and purpose of the legislature in prohibiting the service of children under sixteen years of age in "other employment that may be considered dangerous to their lives or limbs." In *American Car and Foundry Company v. Armentraut*, 116 App. 121 (affirmed 214 Ill. 509), this court decided that the employer of children is bound to know that they are not within the age pro-

hibited by law and that it is no defense that the employment was induced by false statements of the child employed.

Complaint is made of the ruling of the trial court in the admission and exclusion of evidence, in the giving and refusal of instructions, of improper remarks by counsel in argument before the jury, and of excessive damages allowed by the jury. The first count of the declaration charges that appellant unlawfully employed appellee to operate "steam machinery." There is no evidence to support this count. The meat hasher was not "steam machinery" within the meaning of section 11 of the Child Labor Act. Appellee's second given instruction was as follows: "The court instructs the jury that it is unlawful to employ any child under the age of sixteen years and put him at operating steam machinery; and if you believe from greater weight of the evidence, that the defendant employed George A. Rennard and on the 10th day of October, A. D. 1903, directed him to operate steam machinery, and that he was under the age of sixteen years at the time and that while he was so engaged he was injured as charged in the first count of the declaration, then you may find the defendant guilty under the first count to the plaintiff's declaration." This instruction was erroneous and under the facts and issues of this case was highly prejudicial to the rights of appellant. The jury were told that it was unlawful to employ appellee to operate "steam machinery," a statement not applicable to the facts. This is not all nor the worst part of the instruction. The jury are directed to find for the plaintiff if they believe from the evidence that he was injured "as charged in the first count of the declaration." His injury "as charged" is the loss of his hand and arm, and the cause of his injury, "as charged," was in the operating of "steam machinery." We think this is as the ordinary jury would read and understand the count, notwithstanding the further allegation that the "unlawful

employment was the proximate cause of the injuries." The technical expression "proximate cause" is sufficient and quite understood by the profession when used in pleading, but such expressions, unless defined and explained, when embodied in the instruction or referred to in the pleading, are not calculated to enlighten the jury as to the law and oftentimes are misleading. The peremptory instruction to disregard the first count which was asked by appellant at the closing of the evidence should have been given. Its refusal adds emphasis to the error committed in giving appellee's second instruction. The first and third of appellee's given instructions are erroneous, because they submit to the jury the question whether the work required of appellee "might be considered dangerous to life and limbs," whereas the true issue was, whether or not the work was in fact dangerous. Liability is not incurred by employing a child under sixteen years of age for work that *might* be considered dangerous, if in fact the work is not dangerous. We do not regard the error in this instruction as very material were the record otherwise free from error. In the closing argument to the jury appellee's counsel used this language: "The difference between the plaintiff and the defendant was that the plaintiff had a soul and was responsible before Heaven for the truth of what he said, while the defendant was a corporation without a soul to answer hereafter. Don't you know that if O'Neil came here and told the truth he would not have any more of a job than a rabbit in fifteen minutes!" This language was highly improper, used intentionally for an improper purpose, and we are sure that the counsel guilty of the impropriety expected and intended to excite the passions and prejudices of the jury to his advantage, and may not now complain, nor may his client, that we credit the verdict and excessive damages to his improper and effective appeal in the closing argument. The mild ruling of the court without a severe rebuke was not calculated to allay the prejudice

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of the jury and in our opinion did not. Merely to say there is no evidence that the witness O'Neil would lose his job if he told the truth would scarcely impress the jury of the harmful effect of the remarks or that the court so regarded them. No issue as to the condition of the machine was made by the pleading, and the evidence of appellee upon that subject should have been excluded. His testimony that "you have to hold the liver down into the machine (presumably with the hand as he did) until the hasher gets hold of it and eats it up," after objection made, on statement of counsel for appellee that "we are just showing the condition of the machine," certainly must have been understood as proof that the machine was defective. To obviate the harmful effect of this evidence, appellant offered instruction number 13, which was erroneously refused.

For the errors indicated the judgment of the City Court will be reversed, and the cause remanded.

Reversed and remanded.

L. A. Hall v. Annie Ditto.

1. MEANS OF SUPPORT—*what evidence competent in action for.* In an action brought under the Dram-Shop Act for loss of the means of support, it is competent to show the sale of liquor to the plaintiff's intestate as well before as after the specific date alleged, where the declaration charges the sale of liquor upon a specific day and "thereafter."

2. LOSS OF SUPPORT—*when instruction in action for, properly refused.* An instruction in such an action is properly refused which tells the jury that the plaintiff is not entitled to recover unless they believe from the preponderance of the evidence that the liquor sold or given by the defendant to the intestate contributed to his intoxication "in an appreciable and essential degree and that such intoxication was the proximate cause of the injury to the plaintiff's means of support."

3. INSTRUCTIONS—*use of phrase "from the evidence" held not im-*

proper. It is not error to use in an instruction the words "from the evidence," as such a phrase performs the function of the words "from the preponderance of the evidence."

Action on the case. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

DAN MCGLYNN, for appellant.

R. B. HENDRICKS, for appellee.

MR. PRESIDING JUSTICE MYERS delivered the opinion of the court.

This is an action on the case under section 9 of the Dram-Shop Act, brought by appellee against appellant to recover damages for alleged loss of means of support by reason of appellant's selling and giving intoxicating liquors to appellee's husband. The declaration contains one count by which it is alleged in substance that appellant conducted a dram-shop in the city of East St. Louis, and that on or about the 15th day of April, 1905, and at divers times thereafter, appellant sold and gave intoxicating liquors to William Ditto, husband of appellee, by reason of which she lost and was deprived of her means of support. The appellant pleaded not guilty, and upon trial had the jury returned a verdict in favor of the plaintiff, assessing damages at \$500. A motion by defendant for a new trial was overruled and judgment rendered on the verdict, from which the defendant appealed.

Complaint is made of the trial court's rulings in the admission of the testimony of Albert Ditto, a son of appellee. The objection made to this testimony was that it was immaterial, irrelevant and not within the allegations of the declaration. The witness testified in substance that his father had been a drinking man for ten years, that during that time he supported the family as best he could until he got to drinking to excess, about three months prior to the time of the trial,

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and that since then he had not supported the family. Questioned as to seeing his father in the defendant's saloon before the 15th day of April, he testifies, that many times, coming home from work, his father would stop there and get a couple of drinks of whiskey, and sometimes go on home and sometimes remained at the saloon. "Generally he would bring some of the money home that he had earned, but most of it he would blow in, I mean he would get drunk on it." This evidence was entirely proper and relevant under the issues made by the pleading, and it would have been error to exclude it. Under the allegations that appellant sold and gave to William Ditto intoxicating liquors, "on or about the 15th of April, 1905, and divers times thereafter," appellee was not restricted to proof that the sales occurred on the day named and "thereafter." It was material to prove that appellant sold or gave intoxicating liquor to William Ditto, but it was wholly immaterial whether this was done before or after the 15th day of April, the day alleged. In support of her declaration it was required of appellee to prove that she was injured in her means of support, and to do that it was necessary to prove the conduct and habits of her husband as affected by the use of intoxicating liquors. For this additional reason the testimony of Albert Ditto was properly admitted.

The only objection made in argument to the given instructions is that a verdict for plaintiff is authorized if the jury believe the facts necessary to maintain the action "from the evidence" instead of "from a preponderance of the evidence." As stated in the opinion of the court in *C. & E. I. R. R. Co. v. Cleminger*, 77 App. 186, "we regard the objection as fanciful rather than substantial. The word 'evidence,' as here used, could in reasonable interpretation mean nothing less than all the evidence." By appellant's given instruction the jury are told that plaintiff must prove the essential facts by a preponderance of the evidence. This was the only instruction given as to the weight of

evidence required, and when read in connection with instruction for the plaintiff which in no wise conflicts with that proposition, there was nothing in the form of expression or language used calculated to mislead the jury as to the law. Appellant requested, and the court refused to instruct the jury that the plaintiff would not be entitled to recover unless the jury believed from a preponderance of the evidence that the liquor sold or given by the defendant to William Ditto contributed to his intoxication, "in an appreciable and essential degree and that such intoxication was the proximate cause of the injury to the plaintiff's means of support." It is insisted that this instruction should have been given. Under the express provision and language of the statute, liability accrues if the selling or giving of intoxicating liquors shall "have caused the intoxication in whole or in part." If the instruction was calculated to restrict or limit liability imposed by the statute, it was rightly refused. If this were not the effect, no harm was done appellant. If the liquor sold caused the intoxication in whole or in part, the effect was "appreciable" in an "essential" degree, sufficient to meet the requirement of the statute. The statute is plain in language and context, not requiring interpretation, and the instruction proposed by appellant, if not positively vicious, was well calculated to confuse rather than enlighten the jury. The questions whether the intoxication of William Ditto was caused by the liquor sold by appellant, and whether appellee was thereby injured in her means of support, were fairly submitted to the jury, and finding no error in the record prejudicial to appellant, the verdict is conclusive. The damages are not excessive. The judgment of the Circuit Court will be affirmed.

Affirmed.

George A. Boyne et al. v. Vandalia Railroad Company.

1. **GARNISHEE**—*what essential to valid judgment against.* In an attachment proceeding a judgment against the principal defendant is essential to the validity of an attachment against a garnishee served in such proceeding.

2. **GARNISHER**—*what essential to valid judgment against.* By virtue of statute notice to the employer and the employed is required prior to the institution of garnishment by which wages are sought to be obtained. In the absence of the service of such notices a judgment should not be entered and such a judgment, if entered, is a nullity.

3. **JUDGMENT**—*when a nullity.* A judgment is a nullity unless it be for a specific sum mentioned in dollars and cents. The omission of the word "dollars" from the figures employed in the alleged judgment destroys its legal force.

Bill in chancery. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

W. L. COLEY and A. C. JOHNSON, for appellants.

FORMAN & WHITNEL, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery by appellee against appellants, in the Circuit Court of St. Clair county, to restrain appellants from taking other or further steps to enforce the collection of an alleged judgment against appellee as garnishee.

The bill avers in substance, that on March 4, 1905, appellant Drake & Company commenced an attachment suit against one George F. Moseley, before appellant Boyne, a justice of the peace in St. Clair county, and summoned appellee as garnishee; that on March 11, the justice rendered a pretended judgment in the proceedings, in the words and figures following: "Plaintiff in court. Defendant fails to appear. Case called—

witnesses sworn—testimony heard and judgment is rendered against the defendant for forty-four and 45-100 and costs 750 and attachment sustained. Vandalia R. R. having failed to answer, a conditional judgment is rendered against said garnishee, the Vandalia R. R. Co., fifty-one and 95-100 dollars, and a *sci fa* issued returnable March 20, A. M.”; that *sci fa* was issued and returned, and on March 20 the justice entered the following: “10 o’clock A. M. Plaintiff in court, garnishee the Vandalia Railroad Co. fails to appear or answer. The conditional judgment rendered against said Vandalia Railroad Co. on March 11, 1905, at 10 o’clock A. M. is therefore made final and judgment is rendered against said Vandalia Railroad Co. garnishee for the sum of fifty-one and 95-100 dollars, without costs;” and on May 4, execution was issued against appellee, to Constable Thomas Peet (one of appellants) to serve, and that Peet is threatening to levy upon the property of appellee.

The bill further avers, that at the time the suit was brought against Moseley, he was a wage earner in the employ of appellee, and that he is the head of a family and residing with the same; and that no demand in writing was made upon either Moseley or upon appellee twenty-four hours previous to the bringing of said suit, and no such notice was filed with the justice. It is also formally averred that both the alleged judgment of Drake & Co. against Moseley and the alleged judgment against appellee as garnishee are void. A temporary writ of injunction was issued, restraining appellants from taking any further or other steps to enforce the collection of the alleged judgment against appellee.

Appellants entered their motion to dissolve the writ, and demurred to the bill for want of “equity on the face of the bill.” The court denied the motion to dissolve the injunction, overruled the demurrer to the bill; appellants elected to stand by their demurrer, and the court entered a decree making the temporary in-

junction perpetual. And appellants appealed to this court.

The relations existing between appellant Drake & Co. and appellee, as disclosed in the bill, are not such as to bring the case under section 7 of the Injunction Act, so as to bar appellee to any extent; for the reason that unless appellee is bound by the garnishee proceedings it is not bound at all to pay the debt that Moseley owed Drake & Co. or any part of it. It was in no sense appellee's debt at the time the suit was commenced, and appellee was not then "equitably bound to pay it." The obligation between Drake & Co. and appellee, if any exists, is purely a legal obligation, and whether such obligation does exist depends upon whether or not the garnishee judgment in question is a valid judgment. This is the sole question in the case. Section 10 of the Garnishment Act provides: "No final judgment shall be entered against a garnishee in any attachment proceedings until the plaintiff shall have recovered a judgment against the defendant in such attachment." This provision of the statute is mandatory. A valid judgment against the defendant in attachment is a mandatory condition precedent to a valid judgment against the garnishee. "The garnishee has a right to know and demand that it be properly proven, before final judgment is entered against him, that such judgment against the defendant in attachment in fact exists, and that the court had jurisdiction to render it." *Flannigen v. Pope*, 97 Ill. App. 263 (267); *Pomery v. Rand, McNally & Co.*, 157 Ill. 176.

The entry in the justice's docket relied upon as evidencing a judgment in favor of Drake & Co. against Moseley is as follows: "Judgment is rendered against the defendant for forty-four 45-100 and costs 750." In a judgment for money, the sum must be specified in words or figures, with some mark or character designating the precise sum. *Avery v. Babcock*, 35 Ill. 175. "A judgment for 'four hundred and sixty-one and

53-100 damages' is not for any sum of money and is therefore a nullity." *Carpenter v. Sherfy*, 71 Ill. 427. From these authorities and others that might be cited to the same effect it is apparent that the alleged judgment against Moseley, the defendant in attachment, is absolutely void for uncertainty,—is a "nullity." And for want of a valid judgment against Moseley to support it, the alleged judgment against appellee as garnishee is a "nullity." This demands an affirmance of the decree of the Circuit Court.

Counsel insist that the judgment is void for a further reason, and we deem it not wholly improper to discuss that feature of the case. Section 14 of the Garnishment Act provides that before bringing suit of the character of suit brought by Drake & Co. against Moseley, where the defendant is a wage earner and the head of a family and residing with the same, a demand in writing shall first be made upon the wage earner and the employer, and that a copy of such demand shall be left with the wage earner and with the employer at least twenty-four hours previous to bringing such suit. And that such demand shall be filed with the justice before it shall be lawful to issue summons in such case or to require an employer to answer in any garnishee proceedings. And that any judgment rendered without such demand being served upon the wage earner and filed with the justice before the summons was issued "shall be void."

Where such demand has not been made and filed in such case, the judgment against the garnishee is a nullity. The right of garnishment is purely statutory, and it cannot be availed of except upon compliance with the prescribed conditions. They are mandatory requirements precedent to the exercise of the right. The bill alleges that in the case in question no such demand was either served upon Moseley or filed with the justice, and it avers that Moseley was a wage earner at the time the suit was brought and that appellee was his employer. And it further avers that he

“is” the head of a family and resides with the same. To avail of this statute he must have been the head of a family and residing with the same at the time the suit was brought. It is not enough that he was such when the bill in this case was filed, more than three months after the suit was commenced.

It is possible that the intention of the pleader when writing appellee’s bill, was to use the word *was* instead of the word *is*, and that the use of *is* as it there appears is a clerical error. And it may also be true that the justice intended to write the word *dollars* after the words and figures he used in attempting to “enter up” appellant’s alleged judgment against Moseley, and that his omission to do so was a clerical error, but if so, they are errors of such serious character that we are powerless to correct them in this proceeding. We must accept the record as it comes to us, and pass upon it as it is.

The decree of the Circuit Court is affirmed.

Affirmed.

Columbian Building & Loan Association v. Laura Leeds.

1. **CERTIFICATE OF ACKNOWLEDGMENT**—*proof essential to overcome.* To overcome the certificate of an officer authorized to take acknowledgements, the evidence must be clear, convincing and satisfactory, and such certificate is to be regarded as having great and controlling weight until it is so overcome. The testimony of the grantor alone is not sufficient to overcome the certificate. A mere preponderance of the evidence against the integrity of the certificate is not sufficient.

2. **PRODUCTION OF DOCUMENTS**—*when not error to refuse to order.* Whether documents should be produced is a matter to be determined by the trial judge in the exercise of a sound discretion; unless it appear that in refusing so to order he has abused such discretion, reversal will not follow. In this case it was held not error for the court to ~~refuse to~~ require the production of a mortgage made the basis of a foreclosure proceeding.

3. **SURPRISE**—*when new hearing in chancery will not be awarded,*

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because of. A new hearing will not be awarded by a court of chancery because of surprise where it does not appear that diligence to avoid surprise was exercised.

4. NEWLY DISCOVERED EVIDENCE—*what essential to right to new hearing in chancery.* Unless it appear that diligence was exercised to obtain the alleged newly discovered evidence at the hearing, a new hearing in chancery will not be awarded.

5. NEWLY DISCOVERED EVIDENCE—*when not sufficient to entitle new hearing in chancery.* A new hearing in chancery will not be granted in order to permit the production of alleged newly discovered evidence purely of a cumulative or impeaching character.

6. HOMESTEAD ESTATE—*when not released:* The homestead estate is not released as to either the husband or the wife where one of them does not join in such release in the manner provided by statute.

Bill in chancery. Appeal from the Circuit Court of Wabash county; the Hon. PRINCE A. PEARCE, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

P. J. KOLB, for appellant.

GREEN & RISLEY, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery, in the Circuit Court of Wabash county, by appellant against appellee, to foreclose a mortgage on the homestead premises occupied by appellee. A trial was had on evidence produced in open court, resulting in a finding that appellee did not execute the note and mortgage, that she did not acknowledge the same, and that the premises were worth less than \$1,000 and were occupied by her as a homestead. A decree was entered dismissing the bill. From this decree appellant appeals to this court.

Counsel for appellant bases his demand for reversal of the decree rendered by the trial court upon the contentions that the decree is not supported by sufficient evidence; that the court erred in requiring appellant to submit the note and mortgage to appellee for in-

spection before requiring her to answer; that the court admitted the testimony of incompetent witnesses; and that the court erred in refusing to grant appellant's motion to set aside the decree and prayer and order for appeal and to grant a new trial.

Appellee was the wife of Dr. Norman Leeds. Appellee's father had purchased a little home for his daughter and her husband, in the village of Bellmont, Wabash county, Illinois, and deeded it to the husband on his promise to repay the purchase price. Appellee and her husband took possession of the premises and occupied it as a homestead and appellee has continued to so occupy it from that time to the present.

The note and mortgage in question is for \$800, payable to appellant, bearing date January 20, 1896, and purports to be signed by Norman Leeds and appellee, his wife. The mortgage purports to have been acknowledged before Lyman Leeds, who was a notary public residing in the city of Mt. Carmel, and was a brother of Norman Leeds. In June, 1905, Norman Leeds abandoned appellee, leaving her and her two children in possession of the premises, and on October 7 the bill in this case was filed. Appellee answered the bill under oath, setting up homestead, denying the execution of the note and mortgage on her part, denying the acknowledgment of the mortgage, and averring that she had no knowledge of its existence until after she had been abandoned by her husband. She specifically avers that her alleged signatures to the note and mortgage are forgeries and that the certificate of acknowledgment as to her is false and fraudulent.

To put the contention of appellant's counsel as to the law applicable to this class of cases in his own words, it is as follows: "To overcome the certificate of an officer authorized to take acknowledgments, the evidence must be clear, convincing and satisfactory, and such certificate is to be regarded as having great and controlling weight until it is so overcome. The

testimony of the grantor alone is not sufficient to overcome the certificate. A mere preponderance of the evidence against the integrity of the certificate is not sufficient." We agree with counsel as to the law, and cite *Lewis v. McGrath*, 191 Ill. 401, as a recent case in which our Supreme Court has applied this law to a state of evidence.

The evidence in the case at bar abundantly tends to prove, and we think it does clearly, convincingly and satisfactorily prove, that the name of appellee to both the note and mortgage is a forgery, that the mortgage was never acknowledged by her, or presented to her for that purpose, or in any way assented to by her, and is therefore both false and fraudulent. We are of the opinion that the decree is sufficiently supported by the evidence to meet all the requirements of the law.

Counsel insist that the court erred in requiring appellant to submit the note and mortgage to appellee for inspection before requiring her to answer. No authority is cited in support of this position, and nothing appears in this case to take it out of the general rule. The general rule is that whether the court will require production of documents for inspection by the adverse party, rests in the sound discretion of the court. "Production may be ordered for the purpose of aiding a defendant in framing his answer." *Elliot on Evidence*, Vol. 2, sec. 1399.

Concerning the complaint made here, that the court allowed witnesses to testify as to the genuineness of handwriting, who were not shown to be sufficiently acquainted with the writing of the parties to warrant the admission of their testimony with respect thereto, it is sufficient to say that counsel does not point out or refer us to any particular instances of that kind, in his brief or argument. We have, however, borne this matter in mind in reading over the evidence and have not observed that the testimony was objected to on that ground, and further, we find that the evidence does

disclose that each and every witness who testified to handwriting was sufficiently qualified in that respect.

Nearly a month after the final decree was granted and orders for appeal taken, appellant entered a motion to set aside the decree and prayer and order for appeal and for a new trial, on the ground of surprise and newly discovered evidence. The court denied the motion, and counsel insist this was reversible error.

Counsel in effect says that appellant did not know in what manner appellee would seek to corroborate her testimony denying the execution and acknowledgment of the mortgage, and when she produced her testimony he was surprised.

She had filed her answer fully disclosing her defense, and it was the duty of appellant if it desired to contest that defense, to have prepared to meet it, before voluntarily going into the trial. This record does not show the exercise of due diligence on the part of appellant in that respect, nor does it show any reasonable ground for surprise. The evidence, as to handwriting, as to the fact that appellee was not at the notary's office, that she was confined at her home, and that the notary did not come there, is all of that general character that might reasonably have been expected. The fact that the evidence came in greater quantity and with more probative force than was expected, is not such surprise as will furnish a litigant grounds for demanding relief at the hands of the court.

All the alleged newly discovered evidence, except that pertaining to appellee's knowledge of the existence of the mortgage, is either cumulative or impeaching evidence, and courts will not grant a new trial on the grounds of newly discovered cumulative or impeaching evidence, except where such evidence would be fully conclusive, and such is not the case here. The most that can be said is, that if all this newly discovered evidence were admitted, it would tend to weaken appellee's defense and strengthen appellant's case, but it would not put a single issue raised upon the answer

out of the domain of dispute. New trials cannot be granted merely to enable a plaintiff to strengthen his case, or a defendant to strengthen his defense. "If they could, there would be no end of litigation."

The motion for a new trial with its accompanying affidavits discloses that two witnesses had been found who would testify that appellee told them, long prior to the filing of the bill to foreclose, that she knew of the existence of the mortgage. As to this it is true, as counsel contend, that it is not wholly cumulative, nor wholly impeaching, but it is by no means conclusive. The statute provides that "no release or waiver of right of homestead by the husband shall bind his wife, unless she join in such release." "Where the wife does not join in the husband's conveyance, the homestead is not released as to either." *Panton v. Manley*, 4 Ill. App. 210. "There can be no release or waiver of homestead, except in the manner provided by statute." *Stodalka v. Novotny*, 144 Ill. 125. The doctrine of *laches* has no application to the facts in this case.

We find no reversible error in this record. The decree of the Circuit Court is affirmed.

Affirmed.

Henry Brueggemann v. Anthony W. Young.

1. ELECTION CONTEST—*when appeal does not involve.* An election contest, within the meaning of the statute pertaining to appeals, is not involved where the sole question sought to be reviewed pertains to the matter of the taxation of costs.

2. ELECTION CONTEST—*costs may be taxed in.* By virtue of section 18 of the "Costs" Act, costs may be allowed and taxed in cases involving the contest of elections.

3. FINAL ORDER—*what is, for purposes of appeal.* An order denying a motion to tax costs is final and appealable.

4. COSTS—*court has jurisdiction as to, notwithstanding its lack of jurisdiction upon the merits.* Notwithstanding it has been de-

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terminated that a court is without jurisdiction to hear and determine the merits of a cause, it has jurisdiction to rule upon the matter of the taxation of costs.

5. *COSTS—what may be allowed by way of.* Nothing can be allowed as costs, either by a clerk or by a court, but those items which are directed by statute to be allowed.

6. *COSTS—effect of silence in mandate of reversal with respect to.* Where the mandate reversing and remanding a cause is silent as to the costs in the trial court, it is presumed that the appellate tribunal intends that the trial court shall exercise its discretion to award or to deny costs.

7. *TAXATION OF COSTS—when will not be disturbed.* The action of the court with respect to the taxation of costs will not, in the absence of abuse of discretion, be reversed by an appellate tribunal.

Election contest. Appeal from the City Court of Alton; the Hon. J. B. VAUGHN, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

BURTON & WHEELER and LEVI DAVIS, for appellant.

ALEXANDER W. HOPE, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

The controversy involved in this appeal grows out of an election contest instituted in the City Court of Alton, by appellee against appellant. From the decision of the City Court appellant appealed to the Supreme Court, where the proceedings of the City Court were reviewed and it was held that the City Court did not have jurisdiction of the subject-matter, and the judgment of the City Court was "reversed and the cause remanded to that court, with directions to dismiss the petition." And the Supreme Court rendered judgment there against appellee and in favor of appellant for the costs of the appeal. The judgment and order of the Supreme Court is silent as to the costs that had accrued or might accrue in the City Court. The mandate of the Supreme Court goes no further than to direct the City Court to dismiss the petition.

On the 17th day of May, 1905, the remanding order was filed in the City Court, the original case redocketed, and appellant moved the court to dismiss the petition, at the cost of appellee; whereupon the court entered an order dismissing the petition, and took the question as to costs under advisement. And on the 9th day of June, 1905, the court denied appellant's motion to tax the costs against appellee. Appellant excepted, and prosecuted his appeal to this court from the order of the City Court denying his motion to tax the costs against appellee.

Appellee moved this court to dismiss the appeal, and his motion was taken with the case. The principal grounds suggested in support of the motion are, that the statute does not provide for appeal to the Appellate Court in election contest cases; that the statute confers exclusive jurisdiction upon the Supreme Court in such cases.

The matter in controversy upon this appeal does not involve an election contest, and no judgment that could be rendered upon the issues here presented could have any bearing upon the validity of the election contested in the original proceedings.

It is further suggested that no final judgment or decree was entered in the case. We think the order denying appellant's motion to tax the costs against appellee was a final order, and the statute provides for an appeal from all "final orders."

A number of other suggestions are made in support of the motion to dismiss the appeal, but we do not deem any of them of sufficient importance to demand discussion, except the fifth, which is: "Because there is no statute giving costs in election contests in City Courts." As to this objection, we are of opinion that notwithstanding the City Court had no jurisdiction to hear and determine the case, it did have power to dismiss it, and as incident thereto had power to make any proper order as to the costs that had accrued in that court. *Bangs v. Brown*, 110 Ill. 96; *Le Moyne v. Hard-*

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ing, 132 Ill. 78. Appellee's motion to dismiss the appeal is overruled.

The question now is, does this record disclose that the City Court erred in denying appellant's motion to tax the costs of the original contest proceedings in that court against appellee. In this connection it must be borne in mind that "costs were not given at common law and are only taxable or recoverable when awarded by statute." *Fish v. Farwell*, 33 Ill. App. 242. "Statutes imposing costs are to be construed strictly, since they are penal in their character and are regarded as creating liabilities which did not exist at common law." *Gehrke v. Gehrke*, 190 Ill. 166. Nothing can be allowed as costs, either by a clerk or by the court, but items directed by the statute to be allowed. *Roby v. Chicago Title and Trust Co.*, 194 Ill. 228; *Wilson v. Clayburgh*, 215 Ill. 506.

The statute providing for election contests makes no provision for costs. The power to tax costs in such cases must be in chapter 33, the Costs Act, and no special provision is made for them in that act. Such cases are in no sense proceedings at law, and therefore power to tax costs in them cannot rest in provisions applicable to "cases at law." While they are not in the full sense of that term proceedings in chancery, still, the statute creating the proceeding provides that "the case shall be tried in like manner as cases in chancery." We have a long line of cases holding that they are in the nature of chancery proceedings and that the rules of chancery practice apply. Inasmuch as our Supreme Court has held in *Cavanaugh v. McConochie*, 134 Ill. 516, that the costs may be taxed in such cases, we conclude that power must rest in section 18, the section applicable to chancery cases. And this is in harmony with the holding of that court in cases of "will contest," a class of cases analogous to "election contest" cases. *Shaw v. Camp*, 56 Ill. App. 23.

The statute that authorizes the taxing of costs in

chancery cases is as follows: "Upon the complainant dismissing his bill in equity, or the defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant full costs; and in all other cases in chancery, not otherwise directed by law, it shall be in discretion of the court to award the costs or not." In the case at bar appellee did not dismiss his petition, nor did appellant dismiss the same for want of prosecution, and this is not a case where it is "otherwise directed by law." Where the Supreme Court reverses a decree of the trial court and remands the case with directions as to the decree to be entered, and the mandate is silent as to the costs in the trial court, then it must be presumed that the Supreme Court intended that the trial court should exercise its discretion "to award costs or not." *Murphy v. Loos*, 32 Ill. App. 595. And in *Askew v. Springer*, 111 Ill. 662 (667), it is said: "As to the question of costs, we again, as we have many times before, commencing many years since, only refer to the 18th section of the Costs Act. It provides that on the dismissal of the bill (by the complainant for want of prosecution), the defendant shall recover costs, but in all other cases in chancery not otherwise directed by law, it shall be in the discretion of the court to award costs or not. This, as we have many times said, is purely in the discretion of the court, over which we have no control."

While the rule as now applied is doubtless not as sweeping as it was held in that case to be, there can be no doubt of its going to the extent of exempting the exercise of such discretion from being disturbed, except where it clearly appears that it has been abused, and in this case it does not so appear. The record before us discloses nothing of the original case, or at most so little, that in view of all that may have transpired during the progress of the case in the trial court, we are not able to say the action of that court, with respect to the taxing of costs, was an abuse of its discretion. The presumption must be that it was not.

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The judgment order of the City Court of Alton, denying appellant's motion to tax the costs against appellee, is affirmed.

Affirmed.

Louis Maroni et al. v. Anna Paitson.

1. **ASSIGNMENT OF ERRORS—function of.** The assignment of errors upon the record in the Appellate Court performs the same office as a declaration in a court of original jurisdiction.

Action under Dram-Shop Act. Appeal from the Circuit Court of Williamson county; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

M. R. HARRIS, for appellants; W. C. S. RHEA, of counsel.

D. T. HARTWELL and EDWARD M. SPILLER, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action based on section 9 of the Dram-Shop Act, by appellee against appellants, to recover damages for injury to her means of support caused by the death of her husband in consequence of his intoxication caused by intoxicating liquors sold him by appellants. Trial by jury. Verdict and judgment in favor of appellee for \$1,000.

The declaration is in the usual form for such cases, and the defendant pleaded the general issue.

The evidence tends to prove every material allegation of the declaration, and the case appears to be in every respect a complete and meritorious case.

Counsel for appellant claim in their brief and argument that the trial judge made a number of mistakes in his rulings concerning the admission and rejection

of evidence and the giving and refusing of instructions. However this may be, we are powerless to review them, for the reason that "no errors are assigned upon the record or attached thereto."

An assignment of errors upon the record in this court performs the same office as a declaration in a court of record of original jurisdiction. It would be as regular and proper for a circuit court to render judgment on a case where there is no declaration, as for this court to reverse a judgment where there is no assignment of error.

"The failure to assign errors upon the record is not a mere form that will be considered waived if not objected to, but one of substance." *Jesse French Piano and Organ Company v. Meehan*, 77 Ill. App. 577; *Conlon v. Manning*, 43 Ill. App. 363; *Rosin v. Wilde*, 80 Ill. App. 58; *Nortman v. Samouski*, 85 Ill. App. 353; *Marsh v. Jones*, 106 Ill. App. 577. "It is not enough to say that in such cases the earlier practice to dismiss the appeal should be followed instead of affirming the judgment. The latest authority is to affirm." *Rosin v. Wilde*, 80 Ill. App. 58; *Lancaster v. W. & S. Ry. Co.*, 132 Ill. 492.

The judgment of the Circuit Court is affirmed.

Affirmed.

Manton Davis v. Estate of William Pohlman, deceased.

1. **STATUTE OF LIMITATIONS—section 15 construed.** Under section 15 of our Statute of Limitations an action on a judgment rendered by a court of another state is barred in this state in five years "after the cause of the action accrued," that is to say, the cause of action, within the meaning of the statute, does not accrue in this state until jurisdiction exists in the courts of this state to adjudicate between the parties upon the particular cause of action, and, in some manner, to bind them by its decisions.

Contested claim in court of probate. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presid-

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ing. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

WISE & McNULTY and STANLEY D. PEARCE, for appellant.

WILLIAM WINKELMANN and A. H. BAER, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a claim filed by appellant against appellee in the Probate Court of St. Clair county. From the judgment of that court an appeal was prosecuted to the Circuit Court, where the case was tried *de novo*, resulting in a finding and judgment in favor of appellee.

The controlling facts in the case are in substance as follows: During the month of March, 1898, William J. Stone, receiver of the Mullanphy Savings Bank, recovered in the Circuit Court of the City of St. Louis, Missouri, three judgments against William Pohlman, aggregating the sum of \$4,408.40, and the judgments were all duly assigned to appellant.

The Mullanphy Savings Bank was, during the whole time of its existence, a Missouri corporation, engaged in the banking business in the State of Missouri, and William J. Stone, the receiver, and appellant were at all times citizens and residents of that state, as was also William Pohlman prior to and at the time of the rendition of said judgments against him, and thereafter until the year 1901, when he removed to St. Clair county, Illinois, where he resided until his death, July 13, 1902.

Appellant's claim was filed February 23, 1905, against the estate of William Pohlman, then being in course of administration in the Probate Court of St. Clair county, Illinois. To this claim appellee interposed the Statute of Limitations of the State of Illinois. The Missouri statute is neither pleaded, proven, nor in any manner brought into the case.

Counsel for appellee say: "It is unnecessary to consider more than one question in this case, since a decision of that will necessarily be decisive of the case." In this we agree with counsel, and the question is, as they suggest, does the Illinois Statute of Limitations, applicable to the established facts of this case, bar appellant's right of recovery?

Under section 15 of our Statute of Limitations an action on a judgment rendered by a court of another state is barred in this state in five years "after the cause of action accrued." *Ambler v. Whipple*, 139 Ill. 311. The question then is, under the facts of this case, when did the cause of action accrue, within the meaning of the statute? The question is not when did the cause of action accrue in some other state, but when did it accrue in this state. If one who is sued in this state desires to avail of the time when the cause of action accrued in another state with respect to the subject-matter of the suit, he must plead the statute of that state, so as to avail of section 20 of our statute.

Our statute cannot attach, or begin to run with the cause, until such facts occur as will bring the case under its operation, and this cannot be until jurisdiction exists in the courts of this state to adjudicate between the parties upon the particular cause of action and in some manner bind them by its decisions. *Humphrey v. Cole*, 14 Ill. App. 56; *McGuigan v. Rolfe*, 80 Ill. App. 256; *Hyman v. Bayne*, 83 Ill. 256; *Wooley v. Yarnell*, 142 Ill. 442; *Strong v. Lewis*, 204 Ill. 35; *Richardson v. Mackay*, 46 Pac. Repr. 546; *Keagy v. Wellington Nat. Bank*, 69 Pac. Repr. 811. All the cases of this class, so far as we are advised, go upon the theory that one cannot live out the Statute of Limitations on the installment plan, part in one state and part or parts in another or others.

In this case none of the parties, nor anything pertaining to the cause or the subject-matter thereof, had ever been in this state, or within the jurisdiction of her courts, within reach of her processes or under her

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laws, so as to bring the case under the operation of any section of the Statute of Limitations, except section 20, until deceased took up his residence within our borders in the year 1901. Then for the first time a cause of action accrued against him in this state, and until then the statute of this state did not begin to run in his favor.

Counsel cite section 18 of the statute, and claim that it in some way avails appellee in this case, but we are unable to perceive that it has any application to the facts of the case as they appear in the record. The facts of this case do not bring it under any of the prior clauses of that section, and therefore the concluding clause which counsel emphasize can have no application.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

James McIlwain v. Herbert Gaebe, by next friend.

1. EVIDENCE—*physical condition may be shown by non-expert.* It is competent for a layman to testify with respect to, and to describe the physical appearance of an injury, or of an injured limb or member of the body.

2. EVIDENCE—*propriety of permitting real.* It is generally proper to permit a plaintiff suing for personal injuries to exhibit to the jury the member claimed to have been injured.

3. DEPOSITIONS—*specific objection essential to raise question of propriety of attaching exhibits to.* A specific objection is essential to invoke the rule of law that no exhibits shall be attached to a deposition after the same have been closed.

4. X-RAY PHOTOGRAPH—*when error to exclude.* Where an X-ray photograph showing an injured member has been admitted, it is error to exclude other X-ray photographs which show the appearance of a like normal member.

5. BURDEN OF PROOF—*upon whom, rests to show that injury complained of was not produced by other causes than that complained of.* In an action for malpractice, the burden of proof is upon the

plaintiff to show that the injury complained of was not the result of his disobedience of instructions shown by the evidence.

Action in case for personal injuries. Appeal from the Circuit Court of Washington county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

J. T. GIBBS, J. PAUL CARTER and L. D. TURNER, for appellant.

JAMES A. WATTS, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of Washington county, by appellee against appellant, to recover damages for alleged injuries resulting to appellee, by reason of the failure and neglect on the part of appellant to bestow the requisite knowledge, skill and care due from a physician to his patient.

The declaration consists of one count, is in the usual form for such cases, and avers that appellee was suffering from "a dislocation of the elbow joint of the left arm; that appellant was a physician and surgeon, and was retained to treat appellee for that injury and undertook to do so, and that by reason of his ignorance, want of skill and negligence, he failed to discover the dislocation, failed to reduce it, and failed to restore the bones of the joint to their natural position."

The evidence in the case is contradictory and conflicting, and as the judgment must be reversed for error of law, and therefore must be remanded, and may be tried again, we will not enter into a general discussion of the evidence.

Counsel for appellant ask a reversal on the grounds of the admission by the trial court of certain evidence which they contend was improper; the refusal of the trial court to admit certain evidence offered by appellant; the giving of certain instructions on behalf of

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appellee; and the refusal of certain instructions and the modifying of others asked by appellant.

During the trial of the case the court permitted appellee's father, his mother and a neighbor woman who was present, to testify that they told appellant at the time he was making the first examination of the arm, preparatory to treating it, "that it looked like the elbow was out of joint," and they were allowed to state the conversation held with him at that time about the elbow, and to tell the jury how it looked. This evidence is challenged on the alleged ground that it is irrelevant and calculated to prejudice the jury. We are of opinion the challenge is not well taken.

The evidence discloses that appellee had sustained, in addition to the dislocation of the elbow joint, a fracture of both bones of the forearm, and this fracture was also being examined for treatment, in fact appellant was examining the arm to discover what the injuries were, and had undertaken to treat all the injuries to the arm; and he is charged with negligence in failing to discover the dislocation of the elbow joint, in failing to reduce it and in failing to restore the bones of the joint to their natural position. This testimony was clearly relevant to the issues, as tending to prove the negligence charged, when considered with other evidence in the case which tended to prove that appellant did not recognize the condition of the elbow, and did fail to restore the bones of the joint to their natural position. It is contended that these witnesses were laymen and could not know whether the elbow was dislocated or not. This would not disqualify them. They could call the physician's special attention to its appearance, that he might not, in his interest in the other injuries, fail to observe and treat this one also, and this is what they testify they did; and further, laymen may in such cases testify to what was said and done by and in the presence of the parties, at the time, and they may describe the physical appearance of an

injury or of an injured limb or member of the body, as it appeared to them.

In this connection counsel insist that the trial court also erred in permitting the injured arm to be exhibited to the jury. They say this could shed no light upon any material issue in this case. We think counsel's position unsound as to this evidence. It tended to prove the averment in appellee's declaration, that his "elbow joint is stiff" and that he "has permanently lost the use of the said joint and is deprived of the usefulness of his said arm." It is the general practice in this state where damage is claimed for an injured or disabled member of the body, to allow the same to be exhibited to the jury, as a species of "real evidence."

Dr. Jones' testimony was presented in the form of a deposition taken in St. Louis, Missouri, both parties being present by counsel. During the examination it appeared that Dr. Jones had made an X-ray of the elbow, and had the plate present, and this X-ray was repeatedly referred to in both questions and answers, in both the examination in chief and the cross-examination; and at the conclusion of the taking of the deposition, the doctor was asked by counsel for appellee to make a print from the X-ray plate used, and deliver it to the notary to be attached as an exhibit to his deposition. Counsel for appellant interposed a general objection. The notary overruled the objection, the print was made and attached. And upon the trial the print was offered in evidence with the deposition, and admitted over appellant's general objection. Appellant's counsel did not make any specific objection, either at the time of the taking of the deposition or on the trial. The objection was simply "defendant objects." Counsel now insist that it was error to admit the X-ray print in evidence, because it was printed and attached to the deposition after the taking of the deposition had closed; and for the further reason that "it did not and could not, according to the nature of things,

disclose the true condition of the elbow at the time appellant was called to treat it." We think neither of these reasons is availing now; for having been present when the deposition was taken, in order to avail of the rule that exhibits cannot be attached after the taking of the deposition has closed, a specific objection should have been made at the time of the request and the ruling of the notary; so that the taking of the deposition might have been adjourned until a print could be made from the plate they were using and be attached. And when the print was offered on the trial of the case, the general objection furnished the court no light in which to rule upon the objection here urged; and further as to the latter reason urged, while it is true that the print perhaps does not and could not show the condition of the elbow at the time appellant was called to treat it, we think it shows the condition so near the time that appellant ceased to treat it, an important period in the history of the case, as to warrant its admission in evidence, to be considered along with the deposition of Dr. Jones and all the other evidence in the case.

After this print and another was admitted on behalf of appellee, appellant offered in evidence on his behalf an X-ray print of a normal elbow of another boy, for the purpose of illustrating how a normal elbow appeared on an X-ray print. To this counsel for appellee objected, and the court sustained the objection. This was error. The ones admitted by the court are before us, and it is clearly apparent that without a representation of a normal elbow joint made by the same process, with which to compare the ones admitted, the jury might get a much exaggerated and very false impression from the ones admitted.

At the instance of appellee the court gave the following instruction: "The court instructs you that the fact that other surgeons and physicians were called in and examined and treated plaintiff's injured arm, without the knowledge and consent of the defendant,

will not affect the question of defendant's liability, unless it appears from the evidence that the interference of such physician, in some way or manner, tended to produce the injury complained of."

The giving of this instruction was material error. It placed the burden upon appellant of proving, "that the interference of such physicians" *did* "in some way or manner tend to produce the injury complained of," while the law required of appellee that he should prove by a preponderance of the evidence that "the interference of such physicians *did not* in any way or manner contribute to the injury complained of." If the patient has failed to follow the advice of his physician, or departs from his instructions in any material respect, or submitted to treatment by other physicians without his consent, then it devolves upon the patient to prove that such failure, departure, or other treatment did not contribute to the injury complained of.

The instruction given in this case admits that appellee did procure other physicians to interfere with appellant's treatment of the case without his knowledge or consent, and authorizes appellee to recover damages from appellant, without himself making any proof whatever as to the effect of such interference. Giving the instruction its natural meaning, nothing can stand in the way of appellant's liability, but for him to prove, for him to make "it appear from the evidence that the interference of such physicians in some way or manner tended to produce the injury complained of." Such we think is not the law applicable to this class of cases.

Appellant asked the court to give on his behalf twenty-seven instructions. Of these the court gave some as asked; modified others and gave them as modified, and refused a number. The action of the court as to those modified and as to those refused is assigned as error. The modified and refused instructions are too numerous to permit of a detailed discussion here. Instruction No. 11, modified by the court, is of the class

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which may properly be denominated cautionary instructions, and, as asked, was in the form and within the scope usually approved in cases where such instructions are permissible. The giving or refusing of such instructions rest largely in the discretion of the trial court. This, however, we think was a proper case in which to give an instruction of that class, and the trial court might well have given it as asked.

Instruction No. 12 was modified by the court. As asked it was as follows: "12. The court instructs the jury that the vital issue on this trial is did the defendant negligently fail to discover the dislocation and fractures of the elbow joint of the left arm of Herbert Gaebe, or having discovered said dislocation and fractures did he fail to properly treat it, according to the practice of ordinarily careful surgeons, and if you believe from the evidence that the defendant, Dr. James McIlwain, did discover said dislocation and having discovered it did treat it in a reasonably careful and skillful manner, according to the ordinary practice of surgeons, then you should find the defendant not guilty."

Under the issues and evidence, this instruction is proper and substantially correct. It should have been given as asked.

For the errors above noted, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

City Water Company v. Nathan S. Silverfarb.

1. NOTICE—*when proof not sufficient under averment.* When no particular kind of notice or notice by any particular party is alleged, the plaintiff may properly prove any proper notice that would impose upon the defendant the duty charged.

2. WATER SUPPLY COMPANY—*right of, to convey its product upon private property.* A water supply company has no inherent right to convey its product upon private property; its authority so to do

is predicated upon a license revocable at the will of the owner of such property.

Action in case. Error to the City Court of East St. Louis; the Hon. W. J. N. MOYERS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

M. MILLARD, for plaintiff in error.

PAUL IROSE, for defendant in error; D. E. KEEFE, of counsel.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case by defendant in error against plaintiff in error, in the City Court of East St. Louis, to recover damage for injury to his goods caused by the escapement of water into the basement of his shop. Trial by jury. Verdict and judgment in favor of defendant in error for \$217.50.

A Mr. Richardson was the owner of the building where the injury complained of occurred. Plaintiff in error was a public water supply company and maintained a system of water mains and pipes and fixtures under the streets, contiguous and near to the buildings along the same, among them being the building above referred to. That this building might be in condition to receive water from the mains and pipes of plaintiff in error's company, in case the occupants of it so desired, Mr. Richardson had put in place a suitable service pipe and attachments. This building had been occupied by various tenants for some time prior to the injury in question. The one who occupied it last before defendant in error came into possession of it was a barber by the name of Tolson. About the middle of December, 1902, Tolson requested the plaintiff in error to turn the water into the service pipe that the building might be supplied with water, and he continued to use the water until the 22nd or 23rd day of March, 1903, when he disconnected his own fixtures from the

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service pipe, plugged up the end of it and "capped it." He then telephoned plaintiff in error to "shut off the water," receiving in reply, "all right." In a day or two after that he went to plaintiff in error's place to pay the balance he owed for water he had used, and was then informed "that they had received his message to cut the water out." The service pipe was in the basement, extended up out of the ground about four feet and stood three feet from the side and six to eight feet from the rear end.

Defendant in error rented the building and took possession on the 29th day of April, 1903. He used it for a cigar factory, and stored his cases of tobacco in the basement. He was not a consumer of plaintiff in error's water at any time while he occupied the building. He never ordered the water turned into the service pipe, or consented to its being turned in, or knew that it was turned in, or that it was at any time so connected that water could come into it. He did not know the service pipe was there until some time after he had come into possession, and when he did discover it, it was sealed up, "capped," and he thought the water had been turned off, and he had no means at hand of testing it, other than by its appearance. He had no "key," and it was against the rules of plaintiff in error for him to have a key for turning the water from its mains and pipes either on or off. In addition to the foregoing, the evidence tends strongly to prove that it was the practice and custom of plaintiff in error to turn off the water when notified to do so, and that in this instance it had neglected and failed to do so. About November 30, 1903, defendant in error on going into the basement, discovered that the pipe had burst and that the water was "shooting out of the pipe and had ruined all the tobacco." No question is raised as to the amount of damage sustained by defendant in error.

As stated by plaintiff in error, the allegations in

the first and second counts of the declaration, upon which the right to recover is based, are:

First Count. "That it became the duty of the defendant to turn off the water from said premises when it was notified to do so; that the defendant was duly notified to turn off the water from said premises long before the date of the injury to said plaintiff's property, yet the defendant did not turn off its water, but wrongfully and negligently allowed said water to remain turned on said premises."

Second Count. "That the defendant had been duly notified to turn off its water from said premises and that the defendant was in the habit and it was the custom of the defendant when it received notice to turn off the water from certain premises to attend to turning off said water, and it became and was the duty of defendant to turn off the water from said premises; yet the defendant, not regarding its duty on that behalf, did not turn off the water from the aforesaid premises, but knowingly, wrongfully and negligently allowed said water to remain turned on said premises."

The principal contention of counsel for plaintiff in error is that there is no evidence tending to prove either of these counts. They base this contention upon the assumption that it was necessary to the proof as to these counts, that defendant in error should *himself* have given the notice to turn off the water. In other words, that the notice by Tolson was of no avail.

It will be noted that the declaration does not charge that defendant in error gave the notice. The language is, "that the defendant was duly notified to turn off its water from said premises;" and in the second count, "that the defendant had been duly notified to turn off its water from said premises." Not having averred any particular kind of notice, or notice by any particular party, he might properly prove any proper notice that would impose upon plaintiff in error the

duty averred, with respect to the subject-matter averred.

A public water supply company has no lawful right to put its water into, or to maintain it upon the premises of another, without the consent of the owner or occupant. The right of a public water company to introduce its water into private property is in the nature of a license, good only for a specified time, if any particular time is specified, or until revoked, where no particular time is specified. In this case, when Tolson was in possession he had the power to, and did grant the license under which the plaintiff in error entered, and he had the power to, and did revoke that license by giving the notice pleaded and proven.

At the time defendant in error took possession of the premises, plaintiff in error had its water concealed in the same, without right or license, and wholly unknown to defendant in error.

Plaintiff in error insists that defendant in error was guilty of contributory negligence in failing to discover that the water was turned on, in time to have taken steps either to have it turned off or to prevent its escaping. From the facts appearing in our statement above, of what is disclosed by the evidence, it is clear that the question as to contributory negligence was properly left, by the trial court, to the judgment of the jury.

The special interrogatory submitted did not call for an answer as to any ultimate facts in the case, and the answer returned to it by the jury was wholly immaterial. As above stated, we hold that to maintain his case as pleaded in the declaration and under the established facts of this case, it was not necessary for defendant in error to prove that he *himself* had requested or notified plaintiff in error to turn the water off, hence the immateriality of the answer to the question.

Complaint is made of the ruling of the trial court in respect to the admission in evidence of certain of

plaintiff in error's rules. We think there was no serious error in admitting these rules in evidence.

It is apparent from what we have said above, that in our view of the case the trial court did not err in its rulings as to the giving and refusing of the instructions challenged or asked by counsel for plaintiff in error.

We find no error in this record warranting a reversal.

The judgment of the City Court of East St. Louis is affirmed.

Affirmed.

David S. Ravatt v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

1. INSTRUCTION—as to look and listen rule approved. The following instruction upon this subject, approved:

"The court instructs the jury, if you believe from the evidence that there was a space of from thirty to thirty-five feet next to the crossing in which the plaintiff could, by looking up the track, have a plain and unobstructed view of the train that struck him, and if you further believe from the evidence that he looked to the south and did not look at all in the direction of the approaching train that struck him, and that in so doing he failed to use reasonable care and caution for his own safety and protection, you should find the defendant not guilty."

Action in case for personal injuries. Appeal from the Circuit Court of Wabash county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

S. Z. LANDES, E. B. GREEN and T. G. RISLEY, for appellant.

C. S. CONGER and P. J. KOLB, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of Wabash county, by appellant against appellee, to re-

cover for a personal injury sustained by appellant while in the act of driving a team and wagon across appellee's railroad at a public highway crossing in the country. Trial by jury. Verdict and judgment in favor of appellee.

The negligence charged in the declaration is the failure on the part of appellee to ring a bell, or sound a whistle, as provided by statute; and the declaration contains the usual and necessary averment that the appellant was in the exercise of reasonable care and caution for his own safety.

The evidence tends strongly to prove that appellee was guilty of the negligence charged in the declaration, but as to whether appellant was in the exercise of reasonable care and caution for his own safety on the occasion and at the time of his injury, the most that can be fairly said in his behalf is, that the state of the evidence when considered together was such as to make that a proper question to be submitted to the jury.

The alleged errors relied upon for a reversal are the giving by the trial court of certain instructions on behalf of appellee, the modifying of certain ones asked by appellant, and the refusal of the court to set aside the verdict and grant a new trial on the ground that the verdict is against the weight of the evidence.

The instructions are unnecessarily voluminous for so simple a case. They consist of eleven on behalf of appellant and seventeen on behalf of appellee. They fill almost a dozen pages of the abstract, and those on behalf of appellant cover at least as much space as those on behalf of appellee. They are, however, in no sense repugnant, and are of that class, and the state of the evidence as disclosed in the record brings the case within that class, where the instructions must be considered together as one series.

The instructions specially pointed out and challenged by counsel are numbered 1, 2, 3, 10, and 17. No. 1 is as follows: "The court instructs the jury, if you believe from the evidence that there was a space of from

thirty to thirty-five feet next to the crossing in which the plaintiff could, by looking up the track, have a plain and unobstructed view of the train that struck him, and if you further believe from the evidence that he looked to the south and did not look at all in the direction of the approaching train that struck him, and that in so doing he failed to use reasonable care and caution for his own safety and protection, you should find the defendant not guilty."

The objection that counsel urge against this instruction is, as they stated it: "By this instruction, as a matter of law, the negligence of the appellant, barring his right of recovery, is made to depend alone on his looking south instead of in the direction of the approaching train that struck him, regardless of all other facts and circumstances in proof in this case," and they cite in support of this position,—T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540; T., St. L. & K. C. R. R. Co. v. Cline, 135 Ill. 41; Partlow v. I. C. R. R. Co., 150 Ill. 321; C. & St. L. P. Ry. Co. v. Wilson, 133 Ill. 55; and C. & A. R. R. Co. v. Smith, 180 Ill. 456.

We do not understand the instruction or cases cited as counsel appear to understand them. As we understand the instruction, it did not tell the jury that if appellant was looking south instead of in the direction of the approaching train that this would be negligence, but submitted it to be determined by the jury, from all the evidence in the case, whether this would in fact be negligence. And as we understand the cases cited, they hold no more than that in this class of cases it is not for the court to say, as matter of law, that certain specified acts, if proven, constitute negligence; that it must be left for the jury to determine, as a question of fact, not only whether or not such acts have been proven, but also whether or not when proven they constitute negligence. We think the instruction fairly submitted both these questions to the jury, and that it is not bad in the respect complained of.

The 2nd, 3rd, and 10th instructions do no more than

state the duty of the respective parties, under states of fact which the evidence tends to prove. They do not assume the existence of any controverted fact, nor do they tell the jury that any particular fact or state of facts constitutes negligence.

Instruction No. 17 is in the form of an abstract proposition, and does not fully state the law applicable to the phase of the case to which it might apply, but when all the instructions are considered together as one series, as must be done in this case, it does not seem probable to us that the jury was or could have been misled by the instructions, to appellant's prejudice.

With respect to modifications of certain of appellant's instructions, complained of by counsel, we only need to state that counsel have not attempted to point out wherein any of such modifications are improper.

Counsel strenuously insist that the greater weight of the evidence is on the side of appellant, not only as to the negligence charged against appellee, but also as to the exercise of due care and caution on his part, and that for that reason, if for no other, the trial court should have set the verdict aside and granted a new trial.

In this we do not agree with counsel. To our minds the state of the evidence bearing upon the latter branch of the case is such as to make the finding of the jury conclusive. It is only where the verdict is so manifestly against the weight of the evidence as to make it apparent to the court that the verdict was not the result of the impartial and honest judgment of the jury, that it is the duty of the court to set aside the verdict and award a new trial.

The judgment of the Circuit Court is affirmed.

Affirmed.

The Canteen Hunting & Fishing Association v. Benjamin Schwartz et al.

1. MEASURE OF DAMAGES—*in actions for injuries to real property.* In cases of permanent injury to real property the measure of damages is the depreciation in the value of the plaintiff's estate in the premises arising from the injury, together with any damages that may have accrued to then-existing matured crops of other personal chattels; but in cases of temporary nuisance resulting in injury, the right to recover is a continuing one, a cause of action accruing upon each recurring injury for the particular damages sustained thereby, and in such cases nothing can be allowed for depreciation of the market value.

Action in case. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

B. H. CANBY and BURTON & WHEELER, for appellant.

DAVID E. KEEFE, for appellees.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of Madison county, by appellees against appellant, to recover damages for the alleged wrongful obstruction of a stream of water flowing through appellees' premises. Trial by jury. Verdict in favor of appellees for \$750. *Remittitur* of \$250. Judgment on the verdict for \$500.

The amended declaration upon which the case was tried consists of four counts. In substance these counts charge that appellees owned in fee simple and were in possession of fifty-one acres of land; that the natural channel of Cahokia creek passed through this land; that in the year 1892 appellant wrongfully obstructed the flow of the water through its natural channel by erecting a dam across the creek adjacent to appellees'

land; that this dam so obstructed the natural flow of the water as to cause the water to overflow the banks of the creek onto appellees' land, and to stand above the dam and stagnate and stink, and percolate and seep into appellees' land; that the dam prevented the fish from ascending, so as to be in the water of the creek as it passed through appellees' land; and that appellees were damaged in that sediment and *debris* were deposited upon the land, the grass and herbage were washed away and killed, a public picnic ground was rendered unfit for use, the land was rendered wet and marshy and unfit for pasture, and the noxious odors rendered it unhealthy, and appellees were deprived of the pleasure, benefit and profit of taking fish from the waters of the creek where it passed through their premises and of renting boats to others for the purpose of rowing and fishing.

The record in this case consists of 257 pages, and neither the amount involved nor the importance of the questions raised are such as to demand a detailed discussion of the whole record. The only questions so preserved in the record as to call for review and that are of sufficient importance to be worth discussing are those pertaining to admission of evidence as to the character and measure of damages, and those pertaining to instructions as to the measure of damages.

During the progress of the trial the court admitted evidence tending to prove damages resulting from the loss of use and occupation of the premises for the purposes to which it was devoted prior to and at the time appellant erected the dam, from the time of the erection of the dam to the time of bringing the suit, and also admitted evidence tending to prove depreciation of the value of the land resulting from the erection and maintenance of the dam, and gave to the jury instructions as to the measure of damages including both features of the evidence. This is error.

The declaration and evidence both disclose that the

nuisance and resulting injury were of that class which the law denominates temporary, in contradistinction from permanent, and while the declaration avers that appellees were all owners in fee of the injured premises, the evidence discloses that some of them had no interest in the fee, and that one at least had no interest at all to be damaged other than a mere possessory interest.

Appellees rely upon the rule laid down in *C., R. I. & P. R. R. Co. v. Carey*, 90 Ill. 514. That case as explained and made clear in *Schlitz Brewing Co. v. Compton*, 142 Ill. 511 (516), holds no more than that where an injury is caused by a lawful public structure, properly constructed and permanent in character, it may be held to be a permanent injury. In the case at bar, if we assume the existence of all the other requisites, the structure complained of was not a "lawful public structure." Appellant did not have the right to eminent domain, the dam was not constructed or maintained for any public purpose, or devoted to any use in the service of the general public.

In cases of a permanent injury of real estate, the measure of damages is the depreciation in the value of the plaintiff's estate in the premises, arising from the injury, together with any damages that may have accrued to then existing, matured crops or other personal chattels, as incident to the injury. And in such case nothing can be allowed for damages to rental value, or damages to the right of use and occupation, or for anything pertaining to the realty, for these are all included in the depreciation in the value of the premises. In such case the whole cause of action accrues when the injury first occurs, and there is but one injury, and can be but one action by the owner of any one estate in the premises.

In cases of temporary nuisance resulting in injury, the right to recover is a continuing one, a cause of action accruing upon each recurring injury, for the particular damages sustained thereby, until the nuisance

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is abated, but nothing can be allowed for depreciation of the market value of the premises. This is not affected, for the continuing right to recover particular damages as they may accrue, "runs with the land" and compensates for the injury so long as it may continue, the presumption being that an illegal act will not continue forever.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Roy Hey et al. v. John E. Wilson et al.

This case is controlled by the decisions of the following cases: Franklin Union No. 4 v. People, 220 Ill. 355; O'Brien v. People, 216 Ill. 354; Christensen v. Kellogg S. & S. Co., 110 Ill. App. 61; Piano & Organ Workers' Int. Union v. Piano & Organ Supply Co., 124 Ill. App. 353.

Bill in chancery. Appeal from the Circuit Court of Randolph county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

O. A. HARKER, LIGHTFOOT & HARKER and A. E. CRISLER, for appellant.

H. CLAY HORNER, for appellees.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery in the Circuit Court of Randolph county, filed by appellees against appellants, praying for an injunction to restrain appellants from unlawfully interfering with the business of appellees. The case was tried on appellees' bill and supplemental bill, and appellants' answer thereto, and evidence *pro* and *con* produced in open court. The

trial resulted in a decree in favor of appellees, perpetually enjoining appellants, as prayed.

The bill as abstracted by counsel for appellants is as follows: "The bill alleges that appellees are partners, carrying on a livery business at Sparta, in Randolph county, and own and rent out for public entertainment a building known as the Auditorium; that there exist in Sparta certain labor unions; one, the Team Drivers International Union, No. 109; another, the Brotherhood of Carpenters and Joiners of America, No. 479; another, the Brotherhood of Painters, Decorators and Paper Hangers of America, No. 74; another, the United Mine Workers of America, No. 657; and another, the Sparta Local Union of the American Federation of Labor, and also what is known as the Central Trades and Labor Assembly, a body composed of delegates from each of the unions named; that in the year 1901 the said organizations conspired to injure and destroy appellees' business by driving away their customers and establishing a boycott against them; that the officers of the organization had forcibly driven appellees' workmen from their work and, by threat of boycott, had induced appellees' customers to withdraw patronage from them; that they had notified the School Board of Sparta and the Kansas City Lyceum Bureau to desist using the Auditorium for entertainments, and thereby prevented its use, and they had established a boycott against appellees' business by threatening their customers with the hostility of the organization and their members, should they continue to patronize appellees; that they had intimidated and caused to cease from working certain employes of appellees and, by serving a written notice upon such persons that appellees were on the 'unfair list,' had caused such employes to refuse, through fear of injury to themselves, to further work for appellees. The bill further alleges that said unions and the members had so harassed appellees and their workmen that their business in several of their lines had been destroyed,

that no income is derived from them, and that the said unions and their members are still doing all in their power to injure appellees' business by inducing their patrons to cease doing business with them under threat of boycott.

The bill prays for an injunction restraining the appellants, their agents, officers and members from interfering or attempting to interfere with appellees by sending communications, circulars or letters to persons with whom appellees have heretofore had business relations, or persons with whom appellees may hereafter have business relations, for the purpose of inducing, persuading or compelling by threats, intimidations, or in any other manner, from withholding custom from appellees; from publishing, printing, writing or circulating in any manner any matter or thing intended or calculated to deter the public or any individual from trading with appellees; from boycotting appellees, their teams, business, vehicles and workmen, and from menacing or obstructing appellees' business."

A supplemental bill was filed by appellees, setting up a number of particular instances of interference with their business by appellants, since the filing of the original bill. Appellants answered, denying all the material allegations in both the original bill and in the supplemental bill.

As above stated, the case was tried in the Circuit Court on evidence produced in open court. Ninety witnesses were examined and many exhibits were introduced. Any attempt to discuss the great volume of evidence would unduly extend the length of this opinion and could serve no valuable or proper purpose. The bill fully states a cause of action which under the law, as we understand it to be now clearly established in this state, warrants the full extent of the relief prayed in the bill and granted by the decree, and we find that every material allegation of the bill is duly established by the evidence.

Every feature of the law applicable to this case has

been so fully discussed and so clearly announced by our Supreme Court, and by the Appellate Court of the First District, and in so many very recent cases, that we deem the subject not open for further discussion, upon the state of facts disclosed in the record. The cases referred to are: Franklin Union No. 4 v. The People, 220 Ill. 355; John O'Brien v. The People, 216 Ill. 354; Christensen v. Kellogg Switchboard and Supply Company, 110 Ill. App. 61; Piano and Organ Workers International Union of America et al. v. Piano & Organ Supply Company, 124 Ill. App. 353. In connection with the foregoing we cite: Doremus v. Hennessy, 176 Ill. 608, and Purington v. Hinchliff, 219 Ill. 159.

The decree of the Circuit Court is affirmed.

Affirmed.

Harry Ferriman et al. v. The People of the State of Illinois.

1. CONTEMPT—*when attachment for failure to obey subpoena proper.* An attachment for contempt for failure to obey a subpoena is proper, without information, affidavit or interrogatories filed preliminary thereto, where the contempt in question was direct.

2. JUDICIAL NOTICE—*of what taken.* The court takes judicial notice of its own orders and actions in the matter out of which the alleged contempt arises, and of the facts constituting the contempt where the contempt was committed in its presence.

3. CONTEMPT—*what is a direct.* A direct contempt of court is the doing of any improper act in the presence of the court while in session, tending directly to disturb the proceedings or to defeat, disturb or impair the administration of justice, or the refusal to do any improper act required to be done in open court in the presence of the court, where such refusal directly tends to disturb the proceedings, or to defeat, disturb or impair the administration of justice.

4. GRAND JURY—*court may compel obedience of subpoena to appear before.* It is within the power of a court presiding over the sessions of a grand jury to compel witnesses to appear before such body, and, upon their failing so to do, to punish them for contempt.

Ferriman v. The People.

5. *SHERIFF—question of right to serve subpoena.* A sheriff may serve a subpoena in any county of the state.

6. *SUBPOENAS—how service is shown.* The return of the sheriff indorsed upon a subpoena may *prima facie* establish the fact of service.

Contempt proceedings. Error to the Circuit Court of Richland county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

JOHN LYNCH, JR., for plaintiffs in error.

R. S. ROWLAND, State's Attorney, for defendant in error.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

Plaintiffs in error were subpoenaed to appear forthwith before the grand jury of the Circuit Court of Richland county then in session, to give evidence in behalf of the People of the State of Illinois concerning all such matters and things as might be asked of them by the grand jury. They failed to appear, were attached for contempt of court, and fined in the sum of \$25 each.

The Circuit Court of Richland county was in session with a grand jury at its regular April term, 1905, and of the 18th day of April, being the second day of the term, the following subpoena was issued:

"STATE OF ILLINOIS, }
County of Richland, } ss.

The People of the State of Illinois to the Sheriff of said county—Greeting:

We command you to summon Harry Ferriman and John Fahs to appear forthwith before the grand jury, now sitting, then and there to give evidence in behalf of the People of the State of Illinois concerning all such matters and things as may be asked or required of them by the grand jury aforesaid, and of this writ make legal service and due return.

Witness A. Kaufman, clerk of said court, at Olney, this 18th day of April, in the year of our Lord 1905.

[SEAL] A. KAUFMAN, Clerk."

On the back of this subpoena the sheriff made the the following return:

"I have served the within writ by reading the same to the within named Harry Ferriman and John Fahs, this 19th day of April, 1905, as I am therein commanded.

W. C. SHAKE, Sheriff,
By HARVEY J. ELLIOTT,
Deputy Sheriff."

Plaintiffs in error did not appear in obedience to the subpoena, and on the 21st day of April an attachment issued, which was returned on the 25th, "not found," and on the 28th an alias writ of attachment was issued as follows:

"STATE OF ILLINOIS, }
County of Richland, } ss.

The People of the State of Illinois to the Sheriff of said county—Greeting:

We command you to summon Harry Ferriman and John Fahs and them safely keep, so that you may have their bodies forthwith brought before the Circuit Court of Richland county, at the November term to be holden at Olney, Illinois, in said county, to answer the People of the State of Illinois, for a contempt of court in not attending said court as a witness before the grand jury empaneled at April term of Circuit Court, after having been duly served with process. And have you then and there this writ.

Witness, A. Kaufman, clerk of said court and the seal thereof, at Olney, Illinois, in said county, this 28th day of April, A. D. 1905.

[SEAL] A. KAUFMAN, Clerk."

Bail was indorsed on this writ in the sum of \$100. This writ was duly executed.

At the November term plaintiffs in error appeared in open court, accompanied by counsel, and moved the court to dismiss the proceedings and release them from the attachment, because no information supported by affidavit, or affidavit containing charges against them, or interrogatories had been filed against them. The court denied this motion, and counsel assign this ruling of the court as error.

It was not necessary in this case that any information, affidavit or interrogatories be filed. The court took judicial notice of the subpoena and the return of the sheriff thereon, and had personal cognizance of the fact that plaintiffs in error had failed to appear in court in obedience to its command. This established *prima facie* contempt of court on the part of plaintiffs in error; and the court, moved by its duty, issued the writ of attachment. The writ fully disclosed and apprised plaintiffs in error of the nature and character of the charge against them, and the rule afterwards entered against them "to show cause," afforded them ample "opportunity to be heard in their own defense." This is all the law requires in cases of this class of contempt.

The court takes judicial notice of its own orders or actions in the matter out of which the alleged contempt arose, and of the facts constituting the contempt where the contempt was committed in its presence. Encyclopedia of Evidence, vol. 3, page 442.

The court is present in every part of the place set apart for its use and for the use of its officers, jurors, and witnesses. Cyc., vol. 9, page 19. The grand jury is a part of the court. It is merely an appendage of the court. Underhill on Criminal Evidence, sec. 29; Rapalje on Contempts, sec. 67.

This case is one species of direct contempt, and in such cases no information, affidavit, or interrogatories are ever necessary to be filed. Cyc., vol. 9, page 37. The procedure in this species of direct contempt differs from the most summary procedure in such cases, only

in the fact that the alleged contemner must be afforded opportunity to be heard in his own defense, before he can be punished. This is usually done by entering a rule against him after he is brought into court on the attachment writ, to show cause why he should not be punished for contempt of court in failing to obey the subpoena, specifying it. He may answer this rule under oath, either orally or in writing, as he chooses; and the proceeding, being in the nature of a criminal contempt, his answer must be accepted and acted upon as true, except in so far as it may contradict the records of the court, or the facts that transpired in the presence of the court. The contemner will not be allowed to contradict the court's knowledge of any fact occurring in the presence of the court. Encyclopedia of Evidence, vol. 3, page 446 (b).

There are almost or quite as many definitions of "*direct contempt*" as there are authors who have written upon the subject of contempt. None of these definitions are all comprehensive, nor do any of them assume to be so. From them all, and from the application the courts have made of the distinction, we frame the following as correct and sufficiently comprehensive for the purposes of this case. A direct contempt of court is the doing of any improper act in the presence of the court while in session, tending to directly disturb the proceedings or to defeat, obstruct or impair the administration of justice, or the refusal to do any proper act required to be done in open court, in the presence of the court, where such refusal directly tends to disturb the proceedings or to defeat, obstruct or impair the administration of justice.

Plaintiffs in error had been legally subpoenaed, and it was their proper duty to appear before the grand jury, part of the court, and within the meaning of the law in the presence of the court, and they refused. This was one of the very numerous species of direct contempt of court. Bishop in his new Criminal Law so classifies it, in vol. 2, 8th edition, secs. 252 and 253;

and we have seen no text or case that specifically classifies it otherwise. We have before us the original record in the case of O'Hair v. The People of the State of Illinois, reported in 32 Ill. App. 277, a case in all material respects as to this feature of it the same as the case at bar, and we find the entire proceeding there was upon both the theory and practice of direct contempt. And further, it is within the common knowledge of all our judges and lawyers, that from the time that courts were first organized in this state to the present time, the general practice has been to treat the refusal of one to obey a proper subpoena to appear as a witness in court as a species of direct contempt of court and to proceed against him in a *quasi-summary* manner.

A number of things were done in this case which were wholly unnecessary and not noted above, but none of them did or could in any way prejudice the rights of plaintiffs in error. And upon the fifth day of December, being one of the judicial days of the November term, plaintiffs in error appeared in court, accompanied by counsel, and were ruled by the court to show cause why they should not be punished for contempt of court in failing to obey the specified subpoena. And they presented to the court their sworn answer.

In their answer they admit that they were subpoenaed and that they failed to appear, and they set up no justification, in the facts, nor excuse, in the facts, for not appearing, but raise a number of questions as to the law. Such of these as we have not above discussed we will give attention to further on in this opinion.

Where a witness has been duly subpoenaed he is bound to make extraordinary effort to attend. No inconvenience to the witness incident to his attendance will justify his absence. His justification or excuse, in the facts, must be serious and substantial, and such as the court may hold to be reasonable under all the surrounding facts and conditions. Whether the state of the facts disclosed in the answer will be accepted as

sufficient justification or excuse for the witness's failure to obey the subpoena, rests largely in the judicial discretion of the court, and this discretion will not be reviewed, unless it clearly appears to have been abused.

Counsel for plaintiffs in error contend that the subpoena was void, because the court had no power to subpoena or compel a witness to appear before the grand jury. The great weight of authority is against counsel's position, and the question is settled in this state by the universal practice of our courts concurrent with all the legislation upon the subject of courts, grand juries, and procedure, both prior to and ever since the adoption of our Constitution, from the beginning; and in *O'Hair v. The People*, 32 Ill. App. 277, the plaintiff in error was punished for contempt of court, in refusing to obey a subpoena to appear before the grand jury.

Plaintiffs in error set up in their answer that they were not served in Richland county, but that they were in Sangamon county at the time the subpoena was served on them; and their counsel insists that the sheriff of Richland county had no authority to serve a subpoena outside of Richland county. We are of opinion that while he could not have been compelled to go outside of his county to serve it, he might lawfully do so and serve it anywhere in this state, although he could not charge mileage beyond the county line. The subpoena was directed to him and authorized him to summon plaintiffs in error to appear as witnesses. The authority or command to the sheriff was general and unlimited, as will appear from an inspection of the subpoena above quoted. It did not contain the limitation, "if they be found in your county," and being a subpoena, it need not contain it. A sheriff may lawfully serve such a subpoena anywhere in the state, and he may do this in person or by deputy, exactly the same as if served in his own county. And his return is evidence of the service in the court that issued the

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subpoena. In this case, however, evidence of service, whether by affidavit or by return, is wholly immaterial, for plaintiffs in error admitted in their sworn answer that the subpoena was in fact served upon them. "A witness is bound to obey a subpoena whenever it comes to him; no matter whether served by an officer or a person not an officer, or if sent by mail." The Chicago & Alton Railroad Company v. Dunning, 19 Ill. 494.

Counsel for plaintiffs in error insist that the court erred in admitting evidence on the part of defendant in error, upon the hearing in the Circuit Court. He insists that this proceeding is upon a charge of criminal contempt and that in such case the issues of fact must be decided upon the sworn answer of the alleged contemner alone. This position is sound, except as to the limitations stated in another part of this opinion, but in this case no evidence was either tendered or admitted on the hearing, except that the state's attorney offered to the court the various papers on file in the case. Of these the court would take judicial knowledge, in this character of the case. It was at most only calling to the mind of the court facts that the court already judicially knew and had taken cognizance of as they occurred; and further, the sworn answer alone of plaintiffs in error conclusively establishes their guilt. By it the question of their guilt is put beyond the domain of dispute.

The judgment of the Circuit Court is affirmed.

Affirmed.

Eldorado Coal & Coke Company v. George Swan.

1. PEREMPTORY INSTRUCTION—*when should not be given.* A peremptory instruction should not be given where there is any evidence in the case tending to prove the plaintiff's cause of action.

2. INSTRUCTIONS—*how construed.* Instructions are to be taken, read and construed as one charge.

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3. CONDUCT OF COUNSEL—*when impropriety of, will not reverse.* Objectionable actions and words will not reverse a judgment which appears substantially just upon the merits.

Action in case for personal injuries. Appeal from the Circuit Court of Saline county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

E. E. DENISON, for appellant; W. F. SCOTT, of counsel.

LEWIS & THOMPSON, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case in the Circuit Court of Saline county, by appellee against appellant for a personal injury sustained by appellee while in the service of appellant, in its coal mine. Trial by jury. Verdict in favor of appellee and judgment on the verdict for \$999.

The declaration consists of two counts based upon certain provisions of the Mines and Miner's Act. The first charges a wilful failure to maintain a good and sufficient light at the bottom of the shaft, so that persons coming to the bottom of the shaft might clearly discern the cage and objects in the vicinity thereof, and the second charges wilful failure to have stationed at the bottom of the shaft a competent man charged with the duty of attending to signals, preserving order and enforcing rules governing the carriage of men on the cage.

Appellant owned a coal mine and operated it by means of a vertical shaft and cage. The shaft was 407 feet deep, having at the bottom of it a sump 7 or 8 feet deep, and the cage was used in the shaft for the purpose of hoisting coal and raising and lowering men who worked in the mine. Appellee was an employee of appellant working in the mine, and the place where he worked was about 150 feet away from the shaft.

The men were accustomed to quit work for the day at four o'clock in the afternoon, at which time the engineer would blow the whistle to notify the men to assemble at the foot of the shaft for the purpose of being taken to the top. On the occasion of appellee's injury the whistle blew for the men to come out; he went to the foot of the shaft, being the first one to arrive. There was no one stationed there to "attend signals" and to perform the other duties imposed by the statute, and the evidence tends strongly to prove that there was not sufficient light to enable one to "clearly discern" the objects in the vicinity. Appellee fell into the sump and the cage came down on him, causing him to suffer great pain and wholly disabling him from work for four months, and probably permanently injuring him to some extent. He was an able-bodied man, thirty years old and was earning \$2.23 a day.

Appellant asks for a reversal of the judgment, and complains of the rulings of the trial court in refusing to direct a verdict in favor of appellant; in admitting certain evidence on behalf of appellee; in the giving of improper instructions on behalf of appellee; in allowing appellee's counsel to make improper remarks to the jury during the argument; and in overruling appellant's motion for a new trial.

Section 28 (a) of the statute provides: "At every shaft, operated by steam power, the operator must station at the top and at the bottom of such shaft, a competent man charged with the duties of attending signals, preserving order and enforcing the rules governing the carriage of men on the cages. Said top man and bottom man shall be at their respective posts of duty at least a half an hour before the hoisting of coal begins in the morning, and remain for half an hour after hoisting ceases for the day."

(b) "As long as there are men under ground in any mine, the operator shall maintain a good and sufficient light at the bottom of the shaft thereof, so that per-

sons at the bottom may clearly discern the cage and objects in the vicinity."

And section 33 provides that: "For an injury to person or property, occasioned by any wilful violation of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby."

"A wilful violation, within the meaning of the statute, signifies a conscious violation." "An act consciously omitted is wilfully omitted, in the meaning of the word 'wilful,' as used in these enactments of our legislature relative to the duty of mine owners." *Kellyville Coal Co. v. Strine*, 217 Ill. 516 (528).

The evidence tends to prove every requisite to the right of recovery in this case, and where that appears, the court has no power, under the Constitution of the state, to direct a verdict in favor of defendant. *St. Louis National Stock Yards v. Godfrey*, 101 Ill. App. 40 (47).

In this connection counsel strenuously insist, that if it be that the light at the bottom of the shaft was not sufficient to meet the requirements of the statute, there is no evidence tending to prove wilfulness on the part of appellant in that respect; and they say: "There is not one word of evidence in the record tending to prove that the light, as provided, was insufficient when there was no accumulation of smoke, or when the oil had not burned low."

The testimony tends to prove that the general superintendent had control over the lamp, the oil and all conditions affecting the light, and it was his duty to see that the lamp was supplied with oil so that it would make the proper light, and to see that conditions did not accumulate in that vicinity so as to obscure the light to the extent that persons could not clearly discern the surrounding objects. And the testimony tends to prove not only that it was his duty to do and know concerning these matters, but that he had opportunity both to do and know, and in this state of case it was

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for the jury to say whether his omission was a "conscious omission," *i. e.*, wilful, or whether it was an unconscious omission, *i. e.*, mere negligence. Whatever view may be taken of this feature of the case, it is not of controlling importance. The violation of the statute charged in the second count is conclusively proven. The admitted facts establish it, and the proof of one good count is sufficient to support a general verdict.

The only pretense of compliance with the statute requiring a competent man to be stationed at the bottom of the shaft, and to remain there from a half hour before beginning operations in the morning until a half hour after ceasing operations for the day, charged with the duty of attending signals, etc., was to impose these duties upon the only driver in the mine, to be attended to at such times as he was not otherwise engaged, and an undertaking on the part of the general superintendent to perform this duty when not engaged in other duties. The driver's primary duty was to look after his mule and cars and haul all the coal mined from all parts of the mine and cage it, and return empty cars to the miners at their respective working places; and the primary duty of the superintendent was to oversee and superintend the entire operation of the mine. They neither gave, were required to give, nor undertook to give their time and attention to the discharge of the duty of attending to the shaft as the statute requires of one stationed to that duty. Their primary and principal duties took them all over the mine, and at the very hour of quitting time, when the men were assembling to be taken out through the shaft, they were both thirty-five or forty feet away and did not know that appellee had fallen into the sump until after the cage had come down on him.

It is too clear to call for discussion, that appellee was within the class protected by the statute, and the testimony tends strongly to prove and the jury was abundantly warranted in finding that appellant's vio-

lation of the statute occasioned his injury, and it goes without saying that the damages sustained were "direct damages" to him. Willis Coal and Mining Co. v. Grizzell, 100 Ill. App. 480 (483). The trial court did not err in refusing to direct a verdict in favor of appellant, nor did the court err in any of its rulings with respect to the admission of evidence.

Counsel for appellant complains of certain conduct on the part of counsel for appellee during the trial, in respect to the repeated asking of the witnesses certain objectionable questions, and the making of certain remarks in argument to the jury. This complaint is not without just cause, and if the case were a closer case on the controlling facts as to its merit, we would feel called upon to treat this complaint as of serious consequence.

The court gave 15 instructions on behalf of appellee. These are all challenged by counsel for appellant, and in nearly every instance the challenge as applicable to the particular instruction standing alone is well taken, but the court gave 26 instructions on behalf of appellant, and these cured all the errors in all of appellee's instructions, except the 14th and 15th. That is, when all these instructions are read and considered together as one series, they state the law upon the whole case as favorable to appellant as the law will warrant, and leave appellant no just cause of complaint, except as to the 14th and 15th above mentioned.

These instructions are not complete, and do not sufficiently limit and circumscribe the jury in the assessment of damages; and counsel for appellant asked no instruction on that subject, and therefore these are not cured. If the case were a close case on the controlling facts as to its merit, or if the damage assessed had been such as is frequently assessed in such cases, these instructions would demand a reversal.

The record discloses this to be a wholly meritorious case. Under the evidence no reasonable jury could have found otherwise than for appellee, and the

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amount of damages is such as to make it apparent to the court that the jury was not misled to the prejudice of appellant by the instructions or anything that was done or said during the trial.

It is apparent to this court, that by the verdict and judgment of the Circuit Court substantial justice has been done between the parties. In such case slight errors neither call for nor justify a reversal.

The judgment of the Circuit Court is affirmed.

Affirmed.

Thomas Warfield v. John Hohman.

1. PUBLIC HIGHWAY—*when non-existence of, not established.*
Held, from the evidence in this case, that the existence of the highway charged by the plaintiff was not disproved.

Action commenced before justice of the peace. Appeal from the Circuit Court of Massac county; the Hon. WARREN W. DUNCAN, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

H. A. EVANS, for appellant.

COURTNEY & HELM, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This suit was originally commenced before a justice of the peace of Massac county, by appellant against appellee, to recover damages for an alleged trespass by appellee upon the premises of appellant. Trial was had before the justice and appeal taken from his decision to the Circuit Court, where the case was tried *de novo* by a jury, resulting in a verdict in favor of appellee and judgment thereon for costs against appellant.

Appellant was the owner and was in possession of

the southeast fourth of the southwest quarter of section 4, township 16, south range 5 east, in Massac county, Illinois, and appellee was a commissioner of highways of Road District No. 2 of Massac county.

At the March meeting, 1903, of the commissioners of highways of said district, a petition was presented asking the commissioners to grant a new road on the quarter mile line through the west half section 4, township 16, south range 5 east, and beyond into section 9 of said district. This petition was signed by the requisite number of proper petitioners, including among them appellant. The prayer of the petition was granted and the road opened in pursuance thereof. The line of the road passed between appellant's land and a fourth of a quarter section west of it. His fence encroached upon the road and he was given sixty days' notice to move it back. He refused to comply with the notice, and appellee in pursuance of his duty as commissioner of highways moved the fence back the proper distance to meet the requirements of the road according to the petition and survey.

Appellant now denies the existence of a public highway, although he signed the petition and executed a release of damages for the right of way over his land along the line petitioned for. He bases his denial on certain alleged irregularities concerning the making of a certificate, reporting of the survey and filing a plat, and some other details, none of which invalidates the road as to him or absolves him from his release of damages for the right of way over his land.

Upon the whole record it is apparent to us that substantial justice was done by the verdict and judgment of the trial court.

The judgment of the Circuit Court is affirmed.

Affirmed.

Cal Hirsch & Sons' Iron & Rail Company v. Edward Coleman.

1. *WITNESS—may explain circumstances under which, he made contradictory statements.* A witness confronted with a written statement made by him out of court, which conflicts with what he has testified to in court, may usually be allowed to explain the circumstances under which he made such statement out of court, together with his purpose in making it, and how he understood it at the time it was made.

2. *WITNESS—what essential to impeachment of.* The right of impeachment is lost by failing to lay foundation therefor.

3. *CROSS-EXAMINATION—when refusal of court to permit recalling of witness for further, not error.* It is within the sound discretion of the court to allow or to refuse to allow a witness to be recalled for further cross-examination, and, in the absence of a showing of an abuse of such discretion, no reversal will be ordered.

Action in case for personal injuries. Appeal from the City Court of East St. Louis; the Hon. W. J. N. MOYERS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

STEWART, ELIOT & WILLIAMS and WISE & McNULTY,
for appellant.

WEBB & WEBB, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of
of the court.

This was an action in case in the City Court of East St. Louis, by appellee against appellant, to recover for a personal injury sustained by appellee while engaged in the service of appellant in assisting to move a quantity of scrap-iron by means of an engine, block and tackle, and other appliances furnished by appellant and in use for that purpose. Trial by jury. Verdict and judgment in favor of appellee for the sum of \$2,000.

The declaration as abstracted by appellant consists of one count only, and appellant's counsel say: "The

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gist of the declaration is, that the defendant by its foreman, after it had been notified by appellee that a certain rope to be used in the handling of certain iron to an engine, was defective, and not a fit rope to be used for the purpose it was going to be used (for), the rope was nevertheless used, and while the rope was in use, it broke and (thereby) plaintiff received his injuries."

The evidence is contradictory and conflicting as to certain material issues in the case, but it tends to prove every requisite to warrant a recovery. We think the state of the evidence is such as to bring the case within that class where the finding of the jury is conclusive as to the facts.

During the progress of the trial it developed that soon after appellee was injured, one of appellee's witnesses, at the request of appellant's foreman, had signed a statement as to the facts and that the statement he had signed did not agree with the testimony he gave at the trial, in some material respects. Counsel for appellee then asked the witness what he understood he was signing. To this counsel for appellant objected, on the ground that "the paper was there before him and it spoke for itself," and the judge remarked, "Well, he may state what he knows about it." The witness then answered: "Well, what I thought it was, I was over there to sign whether this man was to get any money or not. That it was what they came after me for, whether he was to get any money; whether I was a witness, that was my understanding when I went over there. I did not know anything." Counsel moved the court to exclude the answer, and the court denied the motion. This, it is insisted, was material error and in support of their position counsel cite *Hartley v. C. & A. R. R. Co.*, 116 Ill. App. 277, and *Chicago, St. Paul & Missouri Ry. Co. v. Belliwith*, 83 Fed. Rept. 437.

These cases both relate to the reception of oral testimony to vary or avoid the terms of a written contract,

in the absence of any charge of fraud as to its execution. The witness in the case at bar was not a party to the suit, the statement he signed was not a contract, it was not an instrument upon which any feature of either the case or defense was based, and it was used in this case only as a means of impeaching the witness. We are of opinion that the cases cited do not support the specific objections made. And further, we understand the general rule to be that where a witness is confronted with a statement made by him out of court, which conflicts with what he has testified to in court, he may usually be allowed to explain the circumstances under which he made the out-of-court statement, together with his purpose in making it, and how he understood it at the time it was made; and this is as true of a written statement as of an oral one. The jury, having his testimony, his out-of-court statement, and his explanation, together with such other evidence as may be produced bearing upon the question of his credibility and truthfulness of his statements, may then determine the true weight to be given to his testimony.

Two witnesses were called on behalf of appellant, by whom it was sought to prove that one of appellee's witnesses had made oral statements out of court, in conflict with the testimony given by him in the case. This was objected to by appellee, and the court sustained the objection. Counsel insist that the court erred in this ruling, and cite *C. & A. R. R. Co. v. Pennell*, 110 Ill. 435.

The witness whose statement appellant sought to prove was not a party to the suit, and when on the witness stand had not been interrogated about such statement. The proffered testimony was purely impeaching testimony, and no "foundation had been laid." The case cited by counsel does not support their position. It holds the rule to be as we have always understood it, and as the trial court enforced it in this case. As stated in that case the rule is: "If a witness testi-

fies to a given thing as a fact having a bearing on the issues, and it can be shown that he has uttered words or done acts which he would not have uttered or done if his sworn statement were true, he may be interrogated thereto, and if he denies such matter, the same may be proved, not as a fact bearing upon the issues, but as a fact bearing on the credibility of the witness." The witness in the case at bar whom it was sought to impeach by proving that he had "uttered words," etc., had not been "interrogated thereto."

After the close of the case in chief by appellee, and during the introduction of appellant's evidence, counsel for appellant asked the court for leave to recall one of appellee's witnesses for further cross-examination, the purpose being to lay foundation for the introduction of impeaching evidence. Appellee objected, and the court sustained the objection.

Whether or not one may be allowed to recall his adversary's witness for the purpose of further cross-examination, after the adversary has closed his side of the case, rests within the sound discretion of the trial court, and the action of the court in such case will not be reviewed, unless it clearly appears that the discretion was abused to the material injury of the complaining party. Where the witness is still in attendance upon the court, or can easily or without unreasonable delay be produced, and the subject-matter of the proposed further cross-examination appears to be proper and substantially important, then, unless some substantial reason to the contrary appears, the court ought to grant such request. In this case the record does not disclose enough to warrant us in holding that it clearly appears that the discretion of the court was abused in its refusal to grant appellant's request. And further, this complaint is not set up in the motion for a new trial, nor is it assigned upon the record as error. The court did not err in refusing to give appellant's 6th refused instruction. The instruction purports to

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be based upon the declaration, but it departs therefrom in material respects.

Lastly, counsel contend that the fellow-servant rule applies to this case. This rule is clearly not involved in the allegations of the declaration, nor the theory upon which appellee's side of the case was presented in the trial court. The declaration charges the negligent furnishing of an unsafe appliance with which to perform the work imposed upon appellee, and his evidence sustains his declaration. Appellant introduced evidence tending to prove a state of facts that would bring the case under that rule, and asked and received an instruction submitting that question to the jury, and the jury resolved it against him.

We find no material error in this record. The judgment of the City Court of East St. Louis is affirmed.

Affirmed.

Donk Bros. Coal & Coke Company v. Nicholas Thil.

1. FELLOW-SERVANTS—*when doctrine of, has no application.* Where the duties charged to have been violated were those which could not be delegated by the master, the fellow-servant rule does not apply.

2. CUSTOM—*when proof of, competent notwithstanding not relied upon in pleadings.* Proof of a custom not pleaded may be proper in order to establish an ultimate fact charged.

Action in case for personal injuries. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

WISE & McNULTY, for appellant.

BURTON & WHEELER and W. E. HADLEY, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of

Madison county, by appellee against appellant, to recover for a personal injury sustained by appellee while engaged in the service of appellant in its mine as a driver. Trial by jury. Verdict and judgment in favor of appellee for \$2,000.

The declaration consists of two counts charging in substance, that while appellee was passing along one of the entries or passageways in appellant's mine, in the exercise of due care and caution for his own safety, appellant caused explosives to be discharged in the rock roof of the passageway, whereby the roof was broken and fell upon appellee, and flashes of fire from the explosion struck him and seriously injured him. And that this was done without giving him any notice or warning, and without any knowledge on his part of an intention to do so, or of the existence of danger. The declaration is based upon the common law duty of a master to exercise reasonable care and diligence to provide and maintain a reasonably safe place, and to warn the servant of increased risks and impending dangers known to the master and not known to the servant.

The grounds upon which appellant asks a reversal in this case are: The alleged error of the trial court in admitting certain evidence on behalf of appellee; in giving the first and second instructions given on behalf of appellee; in refusing to give instructions "B," "C" and "D," asked on behalf of appellant; and in refusing to grant a new trial, for want of a preponderance of the evidence in support of the verdict, and because the amount of damages assessed is excessive.

The evidence tends to prove that appellee had been employed by appellant as a driver in one of its mines for more than two years before the time of his injury; that the usual hours for ordinary work in the mine were from seven o'clock in the forenoon to three thirty o'clock in the afternoon; that on the day of the injury appellant had put two of its timbermen at work in the main north entry for the purpose of making it

safe, and their duty was to timber it up where necessary, or to take it down if they could not timber it; that in doing this work these timbermen drilled two holes in the rock of the roof and charged them with dynamite, to be exploded for the purpose of throwing down the rock; that it was the general custom and practice with respect to doing work of that kind in that mine, that the charges of dynamite were not exploded in the entries or drive ways before three thirty o'clock, or until the ordinary workmen were all out of the mine; that appellee took his mule to the stable about three o'clock, and started to go back by way of the main entry to get his coat and bucket, preparatory to going out of the mine for the day, and in doing so would pass under the roof containing the dynamite charges, at a place about three hundred yards from where he started, and that as he reached that point, without any knowledge or warning whatever, except that he heard some one say "look out," or "hey," the dynamite exploded; that it exploded at the same time he heard this expression, knocking him down, bruising and burning him and severely injuring him.

The evidence on the part of appellant tends to prove that the dynamite charges were small charges, ignited by means of fuses fifteen or sixteen inches long, and that such fuses burn at about the rate of one foot to the minute; that just before or at the time the first fuse was lit, both of the timbermen "hollered" "fire," and that this was repeated two or three times, and that after the second fuse was lit they went up the entry towards the face far enough to be out of danger of the charge next to them, thirty or forty feet, and were stopping the men that were coming along; that the two charges were placed ten or twelve feet apart, and that the first one to explode, the one that injured appellee, was the one furthest from where the timbermen stood; that after lighting the fuses the timbermen both went together in the direction of the face, because they did not think that any one would be coming from the direc-

tion of the bottom of the shaft; that after the second fuse was lit they saw a light approaching fast, and they both "hollered" "fire," and one of them "hollered" "shoot," "stop," "stay there"; that when they first saw the light it was fifty or sixty feet from the charge that first exploded; that they "hollered" loud enough to be heard one hundred feet; that the light did not stop, but continued to approach until put out by the explosion; that after the explosion they went up to the place and found appellee there, and that if he had stopped when they first "hollered" he would have been safe. Appellee denies that he heard any warning expression of any kind, until just at the time of the explosion.

The only controverted questions of facts in the case are whether appellant exercised reasonable care and diligence under the circumstances, to warn appellee of the impending danger; whether appellee did in fact hear such warning as was given, and if not, then whether his failure to hear it resulted from want of ordinary care and caution on his part, under the circumstances; and as to the character and extent of appellee's injuries.

We are of opinion that the state of evidence disclosed in this record is such as to warrant the jury in resolving all these questions of fact in favor of appellee, as by their verdict they did. In coming to this conclusion we have not overlooked counsel's contention that the timbermen in charge of the work gave ample warning; that if appellee did not have or heed the warning given, it was because of his own negligence; and that the evidence does not prove such injury as will warrant the amount of damages given by the verdict.

As to the state of the evidence concerning the warning, it must be borne in mind that both the timbermen went forward in the entry from thirty to forty feet beyond the charges nearest the face, that the charges were from ten to twelve feet apart, one of the timber-

men makes it twenty-five feet, that appellee was coming from the opposite direction, that the timbermen say he was from fifty to sixty feet from the charge nearest to him and farthest from them, when they saw the approaching light and shouted "fire," "stop" and "stay there," that they say this shouting could be heard one hundred feet away. At this time, according to their statement, appellee was at the very limit, if not beyond range of this warning, assuming that it was given as they said. Appellee states that he did not hear it, and his conduct corroborates his statement; a witness on behalf of appellee states that he was 60 to 75 feet away from the point of the explosion and that he did not hear any warning; one of appellant's witnesses states that he was from 90 to 115 feet from where the timbermen stood and heard them "holler" "fire," "fire," twice about two minutes before the explosion, and that there was no other "hollering"; another of appellant's witnesses states that he was ten steps (about thirty feet) away from the timbermen, and heard them "holler" "fire," "fire," "fire" and say "stop the men" from coming, and stood there four or five minutes until the shots went off and they did not "holler" anymore.

It was a question of fact for the jury to determine whether the timbermen did really attempt to give all the warning they claim they did and at the time they claim; and then, if it can be assumed that the timbermen did all that they claim to have done, it still remains a question for the jury to determine, whether in leaving the approach to the point of peril, from the direction from which appellee was coming and had a right to come, wholly unguarded at that time of day and under the existing circumstances, and doing no more by way of warning than was done, this did in fact constitute the exercise of reasonable care and diligence to give warning to appellee.

With respect to the extent and character of appellee's injuries and the amount of his damages, the evi-

dence tends to prove that the injuries extended almost entirely over the left side of his body, from his head and shoulders, arm, side and leg, down including the calf of his leg; that the skin was knocked off and the muscles resembled pulp; that the left arm and shoulder were the worst and in appearance resembled raw meat, and "there was no skin on it at all," and the left leg was "just spotted with pieces of solid substance in it;" that he suffered intense pain, and was laid up over a month; that his left arm is still weak, and his hearing somewhat injured; that his physician's bill was \$40.

Counsel strenuously insist and contend that the trial court erred in admitting evidence of the custom or practice in that mine, that no shooting would be done in the entries or driveways until after three o'clock, or until all the ordinary workmen had left the mine. Counsel base this contention upon the fact that there is no averment in the declaration of any such custom or practice. They say this is elementary.

It is true that the declaration does not set up such custom or practice and count upon it as a basis of recovery; it is not pleaded at all. But this does not militate against the right to prove it as an evidentiary fact tending to prove an ultimate pleaded fact, or as an evidentiary fact tending to prove a fact that tends to prove an ultimate pleaded fact, the same as any other fact, condition, or circumstance tending to prove an ultimate pleaded fact may be proven without itself being pleaded. One is not required to plead his evidence, only in so far as it is necessary to do so to fully charge the ultimate facts upon which a recovery is claimed, or a defense is based. This evidence was entirely competent as one of the conditions or circumstances tending to prove the ultimate pleaded fact, that appellee was in the exercise of reasonable care and caution for his own safety. With knowledge of this custom or practice in his mind, appellee would not be required to go along the entry with as sharp a lookout for this particular danger, or to listen as intently

for some warning of its presence, as would be the case if such custom or practice did not exist.

The two instructions given on behalf of appellee are both challenged, and both criticised by counsel. We are of opinion that they were both properly given. They have both been repeatedly approved by both the Appellate Courts and the Supreme Court, in cases where the state of pleading and evidence did not differ in any material respect from the case at bar.

Appellant's refused instruction "B" directs the jury to disregard the evidence as to custom or practice not to shoot in the entries or roadways during the regular working hours. This question is fully discussed above, and we are of opinion the court did not err in refusing this instruction. With respect to instructions "C" and "D," refused by the court, counsel contend that appellee and the timbermen were fellow-servants, as a matter of law, and that the trial court should have so held and directed a verdict in favor of appellant, and that if this be not true, still the court ought to have given these instructions, submitting that question to the jury. The trial court did not err in its holdings with respect to the question as to the fellow-servants. The fellow-servant rule has no application to the case. It is neither involved in the pleading nor in the evidence. The declaration does not charge mere negligence, it charges breach of duties that cannot be delegated to any servant, and the evidence proves every material fact in the declaration. The Supreme Court has very recently had a case under consideration very analogous both in facts and in principle to this case. It is the case of *Rogers v. C., C. & St. L. Ry. Co.*, 211 Ill. 126. In that case the court says: It was defendant's "duty to use reasonable diligence to warn the deceased of danger, and that duty was one which it could not relieve itself of by directing his fellow-servant to perform it. It being a duty owed by the master to the servant, it could not delegate that duty to another, even though a fellow-servant of the

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deceased, and absolve itself from liability for the injury, resulting in consequence of the failure to communicate knowledge to deceased of the increased hazard." And to the same effect is the still more recent case of Illinois Steel Company v. Ziemkowski, 220 Ill. 324.

We find no reversible error in this record. The judgment of the Circuit Court is affirmed.

Affirmed.

Donk Brothers Coal & Coke Company v. John Tetherington.

1. OBJECTION—*when should be specific.* Objections should be specific where they are of such a character as if made specific would enable the examiner to make correction.

2. CROSS-EXAMINATION—*when restriction of, ground for reversal.* Where the court refuses to permit matter material to the issue to be elicited upon cross-examination, where the inquiry made is within the purview of the cross-examination, a reversal will follow.

3. ARGUMENT OF COUNSEL—*what improper by way of.* The following language held to constitute an improper and harmful argument:

"The court after hearing the evidence has seen fit to allow the plaintiff to amend his declaration and increase the amount sued for from \$2,500 to \$3,500, because the evidence justified it."

"Mr. Forman ran for Congress in 1902. He did not know anything then about hiring men to come into court to testify. He has hired men to come and testify in this case. The State of Illinois does not license men to go out and hire other men to come into court and swear away the rights of farmers."

4. ARGUMENT OF COUNSEL—*what does not cure improper.* The mere fact that objection to an improper argument is sustained, does not necessarily cure the injury inflicted.

Action in case. Appeal from the Circuit Court of Madison county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1905. Reversed and remanded. Opinion filed September 14, 1906.

WARNOCK, WILLIAMSON & BURROUGHS and FORMAN & WHITNEL, for appellant.

W. E. HADLEY and BURTON & WHEELER, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of Madison county, by appellee against appellant, to recover damages for injury to appellee's land alleged to have been caused by the negligence of appellant. Trial by jury. Verdict and judgment in favor of appellee for \$1,500.

The declaration consists of three counts. The first charges that appellant wrongfully and negligently placed a dump for the refuse matter from its coal washer in such place that when heavy rains and water came, coal slack, slate, sulphur and other substances were carried into a stream flowing through appellee's farm and polluted the stream, and cast large quantities of such refuse matter upon his land, whereby it was damaged and made unfit for cultivation; the second charges that the operation of appellant's coal washer caused coal slack, slate and other substances from its mine to be carried into the stream, polluting it and depositing large quantities of refuse matter upon appellee's land; and the third charges that the operation of appellant's coal mine and washer caused the waters flowing through appellee's land to become unclean and unwholesome, depriving appellee of the use of the same for watering his stock.

In the view we take of this case it is not proper for us to discuss the weight of the evidence further than to state that we are of opinion that the trial court did not err in refusing to direct the jury to return a verdict in favor of appellant.

During the progress of the trial, a witness was allowed to state, over the objection of appellant, his observation and experience as to the effect of coal slack upon the productiveness of land when washed upon the land from a coal mine. The evidence disclosed that

the observation and experience of this witness was confined to the effect upon his own land, of slack washed upon it from a mine situated about one mile and a half from appellant's mine. The objection interposed was a general objection, counsel simply saying, "objected to."

It is insisted here that the court erred in overruling appellant's objection to this evidence, on the ground that appellee had not proven that the conditions were sufficiently similar. If this specific objection had been made in the trial court, it would doubtless have received due consideration, but having not made it there, we think it too late to make it here. "A party objecting to evidence must point out the objection specifically, and thereby put the adverse party on his guard and afford him an opportunity to obviate it." "Grounds of objections to evidence not specifically made in the court below will not be considered in the Appellate Court." "When the objection to the admission of evidence is of such a character that it may be removed by further proof, it must be stated specifically at the time the evidence is offered." The authorities in support of these general and salutary rules are so numerous and so accessible to all lawyers and courts, that citation of them would appear pedantic.

A witness for appellee had testified on the trial that the crops on appellee's land were not as good as they had been, and that part of the land was damaged 50% of its value on account of the coal slack that had been washed onto it. On cross-examination this witness admitted that he had testified in another case where damage to the same land was in question, that the damage to the crops was caused by water, and that he then gave damages by water as the sole reason for the failure of crops on that land. He was then further asked on cross-examination: "Q. How much has the water damaged it?" Counsel for appellee objected, and the court sustained the objection. This was error. The question asked was within the purview of proper cross-

examination, and the objection to it should have been overruled.

Counsel complain of the refusal of the court to give the 16th and 17th instructions, asked on behalf of appellant. The 16th is as follows: "The court instructs the jury that the defendant company is not responsible for the building or breaking of the Kneedler dam, and if you find from the evidence that plaintiff's land was injured by the coal slack, slate and other substances from defendant's mine, and that said injury was caused solely by the breaking of the dam built by the defendant company in the spring of 1904, and that said dam broke by reason of the Kneedler dam first breaking and that the dam at defendant's mine would not have broken but for the breaking of the Kneedler dam, then you must find defendant not guilty."

Under the evidence of this case, as it now stands in the record, this instruction should have been given. There was no error in refusing the 17th. All that is proper in it is fully embraced in appellant's 11th given instruction.

The most serious and damaging error disclosed in this record is the statements made by counsel for appellee in his closing argument to the jury. The amount of damages that should be recovered in this suit, if any, was a most difficult question for the jury to determine, and was the point in the case where they would be more likely to err than any other, under the evidence as it appeared in the case. It appeared that the farm was in possession of a tenant, and therefore all damages to crops and mere temporary injuries accrued to him. The only damage that accrued to appellee was such as affected the market value of the land, and upon that question the evidence was unusually conflicting and contradictory, consisting of opinions of witnesses *pro* and *con*, with little actual experience or data upon which to base them, and ranging from \$75 per acre to no damage at all.

With this state of evidence before the jury, one of

the attorneys for appellee in the closing argument said: "The court after hearing the evidence has seen fit to allow the plaintiff to amend his declaration and increase the amount sued for from \$2,500 to \$3,500, because the evidence justified it." And "Mr. Forman ran for Congress in 1902. He did not know anything then about hiring men to come into court to testify. He has hired men to come and testify in this case. The State of Illinois does not license men to go out and hire other men to come into court and swear away the rights of farmers." An objection was interposed, and the court sustained the objection. Counsel made disclaimer, saying that he "did not intend to say that the court had passed upon the evidence" * * *. And that he "did not intend to charge Mr. Forman had hired witnesses to swear falsely" * * *. And the court directed counsel "to desist from personalities, and confine himself to the evidence, in his argument."

"Such a statement by counsel is wholly indefensible; and unless it can be seen that it did not result in injury to the defendant the judgment ought to be reversed on account of it. The effects of such (statements) and attacks may be obviated by the action of the court in some cases, while in others it may be effective in arousing passion and prejudice notwithstanding the direction of the court." *Wabash Railway Co. v. Billings*, 212 Ill. 32 (41). The ruling of the trial court at that time, though correct and proper, "does not always remove the ill effects of (such) misconduct of counsel. * * * 'Trial courts should not hesitate to use their authority to restrain all efforts of attorneys to obtain verdicts by using (such) unfair means * * * and whenever such restraining influences do not effect the purpose, the fruits of such conduct ought to be taken away by granting a new trial.' " *Chicago Union Traction Company v. Lauth*, 216 Ill. 176 (183-4). "It is true the learned trial judge declared this statement to be improper, and thereupon counsel for appellee (the attorney himself who made the improper statement)

asked that the remark be stricken out and it was stricken out, and the trial judge did all he could to counteract it, but the harm had been done. * * * The action of the court did not wholly nullify the effect of such misconduct. * * * How far it was potent we cannot say. Of this, however, we are sure: it is better that appellee be put to the trouble and expense of a new trial than that this court should appear to countenance and commend such violations of legal ethics." *West Chicago Railroad Company v. Kean*, 104 Ill. App. 147. "Notwithstanding improper remarks have been objected to and objections thereto sustained, a reversal may be ordered on account thereof if the remarks are of such a prejudicial character as not to have been effaced in effect by the sustaining of the objection thereto." *McKenna v. McKenna*, 118 Ill. App. 240. In addition to the foregoing, the following are only a few of the long list of cases in which statements and arguments by counsel to the jury have been held to be improper and erroneous, viz.: *Chicago City Ry. Co. v. Heydenburg*, 118 Ill. App. 387; *Supreme Lodge Mystic Workers of the World v. Jones*, 113 Ill. App. 241; *George A. Fuller Co. v. Darragh*, 101 Ill. App. 664; *West Chicago Street Ry. Co. v. Musa*, 180 Ill. 130; *Chicago City Ry. Co. v. Ahler*, 107 Ill. App. 397 (406); *Taylor v. Harris*, 68 Ill. App. 92; *West Chicago Street Ry. Co. v. McKeating*, 68 Ill. App. 437; *P., C., C. & St. L. Ry. Co. v. Warren*, 64 Ill. App. 584; *Chicago City Ry. Co. v. Barron*, 57 Ill. App. 469.

For the errors above noted, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Globe & Rutgers Fire Insurance Company v. Emil Willbrandt Surgical Manufacturing Company.

1. *INSURANCE—policy held not canceled. Held*, from the evidence in this case, that the policy in suit had not been canceled and was a subsisting obligation.

Action in assumpsit. Appeal from the City Court of East St. Louis; the Hon. W. J. N. MOYERS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

KRAMER & KRAMER, H. B. DAVIS and SHERIDAN & SHERIDAN, for appellant; COUDERT BROS., of counsel.

F. A. & L. A. WIND and KEEFE & SULLIVAN, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit in assumpsit in the City Court of East St. Louis, by appellee against appellant, to recover on a fire insurance policy. Trial by the court without a jury, by agreement of parties. Finding and judgment in favor of appellee for \$750.

The policy sued on was secured through a firm of insurance brokers of New York City, by the name of Jameson & Frelinghuysen. The policy was number 55,906, for the sum of \$750, for the term of one year, from April 2, 1903, to April 2, 1904, on certain fixtures and machinery in a certain building situated in the city of St. Louis, Missouri. The policy contained, among others, the following conditions: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." "This policy shall be canceled at any time at the request of the insured, or by the company giving five days' notice of such cancellation; if this policy shall be canceled as hereinbefore provided, or

become void and cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy at last renewal, this company returning the customary short rate; except that when this policy is canceled by this company giving notice, it shall retain only the *pro rata* premium."

Upon the trial of the case, appellant admitted that "it issued the policy, and that on the fifteenth day of February, 1904, a fire occurred, and that the insurance upon the property did not equal the value of the property burned, and if entitled to recover anything the plaintiff is entitled to recover the full amount of the policy." And it was "agreed between the parties that the only point involved here, the only question for the court to decide, is the question of whether or not the policy was in force at the time of the fire, including all the collateral questions of law and fact connected with that question." "That is all there is involved."

The undisputed evidence is, that on February 11, 1904, appellant wrote appellee as follows: "We desire to cancel policy No. 55,906, covering on property situated as above, and hereby give you five days' notice required by the terms of the policy. On expiration of such five days' notice the policy will be canceled, and all the liability under the same will cease, and we will, on demand, pay you the *pro rata* amount of premium for the unexpired term thereof;" and that on February 16, 1904, appellant followed up the above notice, by writing to appellee as follows: "We herewith hand you \$2.14, being amount of *pro rata* premium for the unexpired term of policy No. 55,906, which has been canceled on our books, in accordance with the notice sent you February 11th, '04, as per terms of said policy."

If the cancellation of the policy rests upon this action on the part of appellant, it is conceded that the policy was in force on February 15th, when the fire and loss occurred.

Appellant claimed on the trial and claims here, that

there was a prior cancellation of the policy. That the policy was in fact canceled on February 11th or 12th, instead of the 16th, as the above quoted communications from appellant to appellee indicate. They base this contention upon certain correspondence that passed between appellee and Jameson & Frelinghuysen, and certain transactions claimed to have occurred between Jameson & Frelinghuysen and appellant.

Jameson & Frelinghuysen were engaged in the insurance brokerage business. Jameson, the senior member of the firm, was also president of the Globe & Rutgers Fire Insurance Company, the appellant company, and these brokers had their offices in the same building with that of appellant company, in the city of New York. Appellee was in the manufacturing business in St. Louis. As above stated he procured the insurance in question through this firm of brokers. As we understand the law, these brokers were the agents of appellant for the purpose of effecting this insurance, but when that was accomplished and the policy delivered to appellee, their agency ceased. There is nothing in the policy, and we think nothing anywhere in the evidence when it is all considered and weighed together, to warrant the conclusion that they were appellee's general agents with respect to this insurance.

On February 3, 1904, appellee received a letter from Jameson & Frelinghuysen, informing it that they were requested by appellant to return appellee's policy for cancellation, under the terms and conditions of the printed portion of the policy, that is, upon appellant giving five days' notice. At the time Jameson & Frelinghuysen wrote this letter they were not in any sense appellee's agents. To this letter appellee made reply on February 9th, enclosing the policy, and saying, "We ask you to kindly credit us with the return premium. Please make us a statement as soon as possible on the condition of our account, when this has been done, and oblige."

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This letter made Jameson & Frelinghuysen agents of appellee to surrender the policy upon the terms specified, five days' notice, and collect the return premium. It reached them on the 11th, and they delivered it to appellant on that day, and appellant on that day wrote appellee the five days' notice required by the terms of the policy, as above quoted, and followed it up on the 16th with the final notice, that the policy had been canceled, "as per terms of said policy."

All the parties to the whole transaction gave to every feature of it the natural, lawful and just interpretation as it progressed. Up to February 11th, no five days' notice had been given, and without such notice the insurance company had no right to cancel the policy. This both appellant and appellee knew and acted upon. The fact that Jameson & Frelinghuysen delivered the policy to appellant did not authorize appellant to cancel it without giving the requisite notice.

Counsel insist that the policy was canceled on the books of the company on February 12th, as of the 11th. It is true that the evidence shows that at a long subsequent date, when one of the depositions was being taken to be used on behalf of appellant on the trial of this case, appellant's books contained such an entry, but who made the entry, or when it was made, does not appear. This, however, is not very material, for the evidence fails to show that any one had authority to make such entry and bind appellee by it.

The judgment of the City Court of East St. Louis is affirmed.

Affirmed.

**Illinois Central Railroad Company v. Hazel Braden,
Administratrix.**

1. ASSUMED RISK—*when doctrine of, applies.* A servant cannot recover for personal injuries sustained as a result of his failure to obey the orders of his superiors.

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Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Reversed, with finding of facts. Opinion filed September 14, 1906.

KRAMER & KRAMER and B. A. CAMPBELL, for appellant; JOHN G. DRENNAN, of counsel.

WILLIAM A. SCHWARTZ, for appellee; CHARLES A. KARCH, of counsel.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of St. Clair county, by appellee against appellant, to recover damages resulting from the death of appellee's intestate alleged to have been caused by the negligence of appellant. Trial by jury. Verdict and judgment in favor of appellee for \$4,500.

The declaration avers that appellee's intestate was in the service of appellant; that his duties required him to repair semaphores, blocks, block signals and block systems; that while engaged in repairing certain fixtures of one of appellant's semaphores, appellant negligently and without any warning dropped one of the arms of the semaphore, thereby throwing him to the platform below, a distance of twenty feet, causing his death; that appellant knew, or by the exercise of reasonable care ought to have known, that he was at the time upon the semaphore pole engaged in making such repairs; and that he was in the exercise of due care and caution for his own safety.

With respect to the merits of this case, it turns upon two questions of fact. These are: did appellant know, or by the exercise of reasonable care on its part would have known, that appellee's intestate was upon the semaphore pole at the time of the injury? and did appellee's intestate exercise due care and caution for his own safety on the occasion and at the time of his

injury? It devolved upon appellee to prove the affirmative of both propositions, and without proof of both there can be no recovery.

The semaphore was in use by appellant at Belleville, in connection with its "block signal service." The arms of the semaphore were used as a means of signaling approaching trains, and were manipulated by the telegraph operator from his place in the telegraph office, by means of some appliances in use for that purpose. The dropping of the semaphore arm indicated to those in charge of an approaching train that the way was clear, and that the train might continue its course, if in motion, or proceed, if it had come to a stop.

Appellee's intestate had been in the service of appellant as a "signal maintainer" for a year and a half, and was an experienced man in that line of work and in that department of appellant's service, and was familiar with his duties and the manner of doing the work required, and with ordinary risks and dangers incident thereto. He with a number of others was under a general foreman of that department. In the performance of his work it was frequently necessary for him to climb semaphore poles, and such was the case on the occasion of his injury. His foreman had given him explicit "instructions always to notify the operator before going on the pole, so they would not throw the board while he was up there."

On the night before appellee's intestate was injured, it was discovered that the light at the top of a semaphore, at Belleville, was out of repair, and on the next morning, in the ordinary course of business in that department, he was sent from Pinckneyville to Belleville, to make the necessary repairs. He reached Belleville about noon, and without notifying the operator that he was going on the pole, he ascended it by means of the attached ladder, and assumed a position in reach of his work, with one foot on the ladder and the other thrown over the semaphore arm. He had

been in this position but a few minutes, somewhere from two or three to twenty, according to the various estimates of the witnesses, when the operator from his place in the telegraph office, manipulated the appliance for dropping the semaphore arm, to signal a train; the arm dropped in response to the operator's act, and appellee's intestate fell from it to the platform below and was so injured as to cause his death.

In the line of his duty the telegraph operator had control of the semaphore, had the handling of telegraph messages and train orders, and it was his duty to signal the moving of trains by means of the semaphore; and it is not contended that the evidence proves that appellee's intestate "notified the operator before going on the pole, so that the operator would not throw the board while he was up there." But counsel contend that notwithstanding no such notice was given to the operator, appellant had such notice or ought to have had, because the operator knew on the evening before that the light was out of repair and notified the day operator next morning; the general signal service foreman had been notified, and sent appellee's intestate from Pinckneyville to Belleville to repair it, and after he reached Belleville that day the operator knew that he had come there for that purpose. Now it must be borne in mind here, that appellee's intestate and all the other parties knew that there could be no danger to the intestate until he had actually climbed up the pole, that no one not physically present and in sight of him could know at what particular time he would climb the pole but himself; and he and all others knew that no notice could avail except notice to the operator, and he was the particular agent of appellant whose duty it was to give that notice, "so that the operator would not throw the board while he was there." This notice he failed to give, and the undisputed evidence is that the operator did not know that he was on the pole when the board was thrown, when the arm was caused to drop.

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Counsel for appellee contend that if the operator did not know of this fact he ought to have known it, and base this contention on the fact that the operator knew that the intestate had come to Belleville for the purpose of repairing the light and that he had commenced to get ready to do so. All there is on that feature of the case is disclosed in the operator's testimony. He testified in substance that about two or three minutes before the injury occurred, the intestate came into the telegraph office where he was at work and asked him for an electric light globe; that he was busy at the time the intestate came in, copying an order for a train, and could not give him the globe at that time and told him he would get it for him as soon as he got through with the order; that the intestate went out of the telegraph office to the work room where the clerks have their desks, and he supposed remained there; that when he got through copying the order he delivered it to the conductor, and in order to let the train proceed it was necessary for him to drop the board to show that the block was clear; this he did and saw intestate after he had fallen. He further testified that the semaphore pole stood on the outside of the building within about seven feet of the desk where he was at work on the inside, but that the top of the pole extended so far above the roof that it would be impossible for him to see a man up there, and that when he "dropped the board or arm he had no idea Mr. Braden (appellee's intestate) was on the pole." The operator further testified that the intestate did not tell him that he had come there to fix the light on the semaphore, but knowing that was a part of his duty, he supposed it to be his purpose there, and he supposed that was what he wanted with the globe.

A train was in the vicinity seeking a clearance, the operator was busy transcribing a message from the train dispatcher, he informed the intestate he would get him a globe as soon as he got through with that most important matter. The intestate went into an-

other room, and he believed, and he had reason to believe, that he would remain there until he gave him the globe.

There is nothing in all this that could cause any reasonable man to suspect that the intestate would go upon the pole without either waiting for the operator to give him the globe or notifying the operator, as both he and the operator knew it was his duty to do. The operator did not know that the intestate was on the pole when he dropped the arm, and it is apparent to the court that all reasonable and disinterested minds will agree that he was not guilty of negligence in not knowing.

The judgment of the Circuit Court is reversed, and we find as ultimate facts to be incorporated in the judgment, that appellant was not guilty of the negligence charged in the declaration, or any part thereof; and that William B. Braden, appellee's intestate, came to his death as the result of his own negligence and breach of duty, in failing to notify the operator that he was going upon the semaphore pole, from which he fell.

Reversed.

**Baltimore & Ohio Southwestern Railroad Company v.
Robert B. Stewart.**

1. NEGLIGENCE—*how much of charge of, must be proven.* It is not incumbent upon a plaintiff to prove more than one of the averments in his declaration; it is sufficient if he proves that the defendant did any one of the wrongful acts or was negligent in any one of the ways charged in the declaration, and that such negligence contributed to the injury complained of.

2. MEASURE OF DAMAGES—*in action for injury to crop.* Where the crop is not up, the damage should be estimated upon the basis of the rental value and the cost of seed and labor in preparing the ground and planting the crop; where the crop is up, but not so far matured that the product can be fairly determined,

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the injured party can recover in addition to the above, the cost of any labor bestowed after the planting; where the crop is more or less matured so that the product can be fairly determined, the value of the crop at the time of the loss is the measure of damages, and it is only where the crop is fully matured and ready to be harvested, that the damage can be determined by the market value of the crop, less the cost of harvesting and marketing, which must include all care and preparation for marketing, such as packing, crating, baling, threshing and the like, according to the nature of the crop.

Action in case. Appeal from the Circuit Court of St. Clair county; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

KRAMER & KRAMER, for appellant; EDWARD BARTON, of counsel.

VICTOR K. KOERNER, KENT KOERNER and W. K. KOERNER, for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action in case, in the Circuit Court of St. Clair county, by appellee against appellant, to recover damage to the crops and possessions of appellee, caused by the overflowing and flooding of his fields and farm, alleged to have resulted from wrongful and negligent acts of appellant. Trial by jury. Verdict in favor of appellee for \$1,499.75. *Remittitur* of \$299.75. Judgment on the verdict for \$1,200.

The declaration charges that appellee owned a leasehold estate in 931 65/100 acres of farm land and was in possession of the same, cultivating crops therein and using it for agricultural purposes; that there flowed through this land a well-defined stream of water of sufficient width, depth and capacity to at all times carry off all water and drift draining and flowing into and through it, without overflowing its banks; that appellant obstructed that stream, and changed its natural course and direction for the distance of about one mile,

by means of a ditch of insufficient capacity to carry the water and drift, and that the ditch was negligently allowed to become clogged and obstructed, and that by reason of the alleged wrongful and negligent acts on the part of appellant, the water was caused to flow over appellee's land and stand on it and destroy and damage his crops, wash away his dike and carry and deposit drift upon his premises.

Appellant contends that this case falls under the rule that, "a tenant leasing land which is subject to recurring injuries from overflows and damage to crops occasioned by lawful and permanent causes existing when he leased the land, is a volunteer, taking it subject to such damages, and with no right of action to recover for the same." In this view of the case we cannot agree with counsel. The causes alleged, and which the testimony tends to prove, are neither "lawful nor permanent," within the meaning of the rule.

Counsel further insist that there can be no recovery in this case, because there is no proof that appellant was notified to abate the nuisance before the injury complained of occurred, and they cite the rule: "Where a party comes into possession of land as grantee with an existing nuisance upon it, he cannot be held liable to an action for damages until he has been notified to remove it." This rule does not apply to this case, for the reason that the declaration avers, and the evidence tends to prove, that appellant itself and not its grantor did all the acts complained of. The ditch was dug and the course of the stream changed in the summer of 1902, by appellant, after it had acquired possession of the railroad and its right of way.

Counsel state that there is no evidence tending to prove that appellant obstructed the stream, and therefore the court should have directed a verdict for defendant. Without discussing whether or not the evidence tends to prove that fact, it is sufficient here to state that the declaration avers not only that appellant

obstructed the stream, but that it changed its natural course and direction, and also that it negligently allowed the new channel to become clogged and obstructed.

It is not incumbent upon a plaintiff to prove more than one of the averments in his declaration, relative to wrongful acts or negligence of the defendant. It is sufficient if he proves that the defendant did any one of the wrongful acts, or was negligent in any one of the ways charged in the declaration, and that such act or negligence contributed to plaintiff's injury as charged. *C. & E. I. R. R. Co. v. Rains*, 106 Ill. App. 539. This view of the case we think also disposes of the question of variance raised by counsel in this connection.

Counsel call our attention to the fact that the declaration avers that appellee was the owner of the crops destroyed, and they insist that the evidence shows that appellee's nephew was the owner of one-fourth of the crops. The evidence shows that this nephew was acting as manager of the farm for appellee, and was to have as compensation for his services, one-fourth of the crops raised. His statement of the contract under which he served appellee is: "If I raised nothing I made nothing; I was to have a portion of the profits; I was to have one-fourth of what was raised on the place." Under the contract no title or ownership in the crop would pass to the nephew until the crop was matured.

Counsel contend that the 1st and 4th instructions given on behalf of appellee are erroneous, because they assume that the natural water course was changed. If it be conceded that the instructions, or either of them, might be understood by the jury, as counsel contend, still, under the evidence in this case, the giving of them would not be error. The wholly undisputed evidence proves the facts that the natural water course had been changed, and that appellant changed it. It is never

error to assume, in an instruction, a fact that has been clearly established in the case, by uncontradicted evidence.

Counsel criticise appellee's second instruction, and say that it authorizes the jury to find for appellee, although they might believe that the stream was obstructed by nature, as was appellant's contention on the trial, and that it does not limit the jury to the damages caused by the construction and maintenance of the ditch. If the instruction stood alone, there would be much force in the charge made against it, but any defect that may be found in that instruction, in the respects complained of, we think is fully cured by the 7th, 8th and 9th instructions given on behalf of appellant.

Appellee's 3rd and 5th instructions are the same, except the 3rd applies to the first count of the declaration, and the 5th applies to the second count. These instructions are challenged and are as follows:

"3. The court instructs the jury that if they find for the plaintiff on the first count of the declaration, they should assess his damages upon the following basis: As to that part of plaintiff's land upon which no crop was yet up, they should take into consideration the rental value of said land and the cost of seed and labor expended by plaintiff thereon, if any is shown by the evidence. As to that part of plaintiff's land upon which a crop was up and more or less matured, they should take into consideration what they believe from the evidence the reasonable market value of such crop at maturity would have been, deducting therefrom the reasonable cost of harvesting and marketing such a crop, as shown by the evidence."

These instructions do not lay down the correct rule for assessments of damages in such cases. The true rule is: "Where the crop is not up, the damage should be estimated upon the basis of the rental value and the cost of seed and labor in preparing the ground and planting the crop; where the crop is up, but not

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so far matured that the product can be fairly determined, the injured party can recover, in addition to the above, the cost of any labor bestowed after the planting; where the crop is more or less matured so that the product can be fairly determined, the value of the crop at the time of the loss is the measure of damages, and it is only where the crop is fully matured and ready to be harvested, that the damage can be determined by the market value of the crop, less the cost of harvesting and marketing, which must include all care and preparation for marketing, such as packing, crating, baling, threshing and the like, according to the nature of the crop."

In this case none of the crop was matured. The wheat, which constituted a large item, was the furthest advanced, and it had only reached the stage where "it was about ready to head." We are of opinion the court erred in giving the third and fifth instructions, given on behalf of appellee.

Counsel complain of the action of the trial court in refusing to give a number of instructions asked on behalf of appellant. In our opinion there was no error in refusing these instructions. Our views concerning the subjects covered by them are fully disclosed by what has already been said in this opinion.

For the errors above noted the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Lumaghi Coal Company v. Charles A. Bartlett, Administrator.

1. **ASSUMED RISK**—*application of doctrine of, precludes recovery by servant from master.* Where the servant had assumed the risk which resulted in his injury, he cannot recover from his master.

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Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURBOUGHS, Judge, presiding. Heard in this court at the August term, 1905. Reversed, with finding of facts. Opinion filed March 22, 1906. Rehearing denied August 29, 1906.

WISE & McNULTY, for appellant; ELLERBE & ELLERBE and L. R. BROKAW, of counsel.

BURTON & WHEELER, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This suit was brought by appellee as administrator of the estate of Rudolph J. Novosat, to recover damages resulting to his widow by reason of his death, while employed in the coal mine of appellant in Madison county, Illinois.

The declaration charged that Novosat was employed by appellant to work in its mine as a driver; that appellant, not regarding its duty to furnish him with a reasonably safe place in which to work, provided him with a certain roadway over which he drove his cars, which was full of holes, and the ties upon which the rails were laid, so exposed that the tail-chain and appliances by which the mule was attached to the cars, were liable to be caught thereon; that the track over which he had to drive was so steep and the rails thereon so slick that the cars would proceed down the track at a rate of speed as fast as the mule he was driving could run; that the mule was hitched to the car by certain appliances, among which was a hook by which the harness on the mule was attached to the front end of the car; that the hook furnished Novosat would become unhooked from cars when they were going down grade, and was therefore unfit, unsuitable and not reasonably safe for the purpose for which it was used; that while Novosat was driving a mule in the mine attached to cars, the hook became unfastened and caught in a tie of the track over which he was

driving or upon some stationary object along the track, causing the car to stop suddenly, throwing him to the ground and inflicting injuries from which he died. The verdict and judgment were in favor of appellee for \$1,500.

The only question presented, which we find necessary to consider is, whether the evidence in the case was sufficient to sustain the verdict. Novosat, who at the time of his death was twenty-six years old, was an experienced driver when employed by appellant, and had worked in appellant's mine four or five days, making sixteen to seventeen loaded trips a day, prior to the day he was injured. On May 13, 1904, complaint having been made that coal was not being taken out of a certain entry fast enough, the superintendent of the mine took him from the place where he had been working and sent him to a side entry to bring out the coal. Before sending him in, the superintendent said to him: "There is a pretty steep grade in there, and I will send Fuchs (the boss driver) in with you." Novosat wanted to go on without waiting, but the superintendent made him wait until Fuchs could go with him. This entry was a "stub entry" leading off from the main entry, had been open and used as it was on the day named for two years, and contained ten rooms about seventy-five feet apart. Room ten was farthest from the main entry. The entry ran on a level with the vein of coal and the track on the floor descended gradually from room number ten to room number seven, where it became nearly level. After leaving number seven the track descended again and between number five and number three there was quite a steep grade, spoken of by some of the witnesses as a hill. In hauling the coal out of the entry two cars were attached together and the mule was hitched to the front one by a chain called a tail-chain. On the end of the chain was a hook which was hooked into the coupling on the car. The speed of the car in coming down grades was checked by placing a sprag or stick in the wheel between the spokes and the

bed of the car so that the wheel could not revolve, but would slide along the track. The steeper the grade the more wheels there were spragged, and the result was to make the rail on the side where the wheels were spragged very smooth and slick in the steep places. In coming out with loads it was customary for the driver to stand with one foot on the bumper, the other on the chain to keep it taut so the hook could not come out, and one hand against the mule to assist in holding the car back. The mule in going along the entries would, as a rule, step between the ties upon which the tracks were laid to get a surer footing and would thus dig out the clay and other material used between the ties and make holes. This was especially true on the grades, where the holes some times extended below the bottom of the ties. Fuchs, as directed by the superintendent, took Novosat with him, and together, taking two empty cars, they went into room number ten, where they got two loaded cars to bring out with them. As they got out into the entry Fuchs spragged two of the wheels and at number seven they stopped and two more sprags were put in. The sprags were all put in the wheels on the same side of the car as was the custom at that place, there being some obstruction near the rail on the other side; thus all the wheels on one side were blocked, the cars each having two wheels on a side. Fuchs had put the hook in the coupler at number ten, and at number seven, when they stopped, the hook in some manner came out. Novosat saw it, picked up the hook and coupled the chain to the car again. As they started again Fuchs said to Novosat: "Joe, I will drive down," and he replied: "No, I will drive." Fuchs again said: "Maybe you had better let me go down," and Novosat answered: "No, we will both go down." Novosat then took his place on the left side, with one foot on the bumper and one on the tail-chain, and with his hand against the mule, while Fuchs stood on the right side with his foot on a projecting iron. As they went

down the steep grade, between rooms three and five, the tail-chain became unfastened from the car and the hook dropped down and caught under a tie, thus stopping the mule. The cars ran against the mule and were suddenly stopped, causing Novosat to be thrown off and killed.

There was no controversy whatever concerning the circumstances leading up to the death of Novosat, or the conditions existing in the mine at the time and previous thereto, and we are of opinion that the uncontradicted evidence in the case shows that Novosat came to his death by reason of one of the ordinary risks and hazards of the business in which he was employed and not by reason of the negligence of appellant; that he was an experienced driver; that he was warned of the steep grade or hill by the superintendent; that he was shown over the way by Fuchs, the boss driver; that he was again warned by Fuchs just before he started down the grade; that he was familiar with the kind of work and chain and manner of using the same in the mine, by his experience of four or five days in which he had to use them a number of times; that he was familiar with the hook in question from the fact that he picked it up and fastened it himself just before he started down the grade; that not only were the dangers and risks connected with driving through the entry in question, open and obvious so that he could have ascertained them by the use of ordinary care, but the evidence shows they were pointed out to him and he had actual knowledge of them; that not only did he know the danger, but when warned by Fuchs who proposed to drive the car down, refused to let him do so, but insisted upon driving down himself.

Under these circumstances it must be held that Novosat assumed the risk of going down the grade in question in the manner in which he did, and therefore appellee was not entitled to recover in this case. C. & E. I. R. R. Co. v. Heerey, 203 Ill. 492.

The judgment of the court below will be reversed.

Reversed with finding of fact.

Finding of facts, to be incorporated in the judgment: We find as ultimate facts, that the death of Rudolph J. Novosat, appellee's intestate, was not caused by the negligence of appellant, but was brought about by one of the ordinary risks and hazards of the employment in which he was then engaged, which he voluntarily assumed.

Daniel A. Haas v. E. H. Tegtmeier.

1. INSTRUCTIONS—*containing general propositions of law may be refused.* Instructions, though correct in principle, if they contain merely general propositions of law not specifically applied, may be refused.

Action in case. Appeal from the Circuit Court of St. Clair county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

DILL & PFINGSTEN, for appellant.

SCHAEFER & FARMER, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action on the case by appellant to recover damages from appellee, a physician, for having, as alleged, negligently and carelessly communicated the disease of small-pox to appellant and his four minor children, while appellee was in professional attendance upon appellant's wife.

The first count of the second amended declaration, on which the trial was had, charged that appellee was, at the time he was attending appellant's wife, also attending a man named Lang, who was afflicted with the small-pox; that small-pox is a contagious disease, and it then and there became the duty of appellee to exercise reasonable care and caution to prevent spreading

said contagious disease to the appellant, but that he disregarded his said duty and carelessly and negligently came directly from said Lang to the house of appellant, without using due care and caution to prevent carrying said contagious disease to the appellant; that by reason of such carelessness and negligence appellee caused appellant and four of his minor children to take said disease. The second count was in effect the same as the first, but set out more at length and in detail the matters relied on for recovery. After the trial commenced appellant filed what he called an amendment to the second count, but which appears to have been an independent additional count. The so-called amendment alleged that while appellee was treating appellant's wife, appellant learned that appellee was also treating said small-pox patient; that appellant thereupon told appellee he must cease to treat his wife and desist from visiting his house; that appellee then told appellant that he had not and would not enter the house of said Lang, nor would he go into the room where Lang was confined, but that he had treated Lang from the outside of the room by seeing him through the window and would continue to so treat him, and assured appellant that there was no danger of communicating said disease from Lang to appellant or his family; that relying upon these assurances appellant permitted appellee to continue to treat his wife until her death, some five days later; that such statements made by appellee were false, and that appellee had, prior to the time of making said assurances, entered the house and room in which Lang was confined and continued to enter the same and treat said Lang until the death of Lang on January 1, 1905, and thereby caused appellant and four of his minor children to take said disease. To the second count so amended, appellee filed a general and special demurrer, one of the special causes of demurrer being that the count, as amended, stated an action in assumpsit and changed the cause of action from case to assumpsit. The demurrer

was sustained, and this action on the part of the trial court is assigned by appellant as error, and is the principal subject of discussion by counsel on both sides.

If the so-called amendment is to be considered as part of the second count, then the count as amended was bad on general demurrer. The allegation of the count before it was amended and the theory upon which it was based, was that it was the duty of appellee to exercise reasonable care and caution to prevent carrying the disease from the small-pox patient to appellant's family; that he neglected to do so and that by reason of his carelessness and negligence in failing to take the necessary precautions to prevent carrying the disease, he conveyed the same to appellant and his four minor children. The theory on which the cause of action stated in the amendment is based, is that appellee promised appellant if he should be permitted to continue to treat appellant's wife he would not enter the house of Lang, nor go to the room in which he was confined, but would treat said small-pox patient from outside of the room by seeing him through the window, at the same time assuring appellant that such had been his manner of treatment of Lang theretofore; that the statements of appellee as to his prior manner of treatment of Lang were false, and that he continued for a number of days, after making such assurances or promises, to enter the room of Lang and treat him, and that by reason thereof appellee conveyed such disease to appellant and his four minor children. The same count, therefore, relied upon two independent and wholly dissimilar causes of action which could not properly be joined in the same count, and made the same bad on general demurrer. If the amendment be treated as an independent count, it was subject to demurrer for the reason that it apparently states an action in assumpsit, relying as it does upon appellee's alleged failure to comply with promise not to enter the house or room of the small-pox patient, and counts in case and assumpsit cannot be joined in the same

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declaration. After the demurrer was sustained to the second count as amended, the case proceeded to trial upon the first count above referred to, and resulted in a verdict in favor of appellee, and a judgment against appellant for costs.

Upon the trial the court, on motion of appellee, excluded certain testimony of appellant and two of his daughters, in relation to the conversations alleged to have been had by appellant with appellee on December 27, 1904, concerning the matters set forth in the amendment to the second count. As a demurrer had been sustained to the second count as amended, and the testimony in question related only to the matters relied upon in the amendment and did not tend to support the cause of action alleged in the first count, it was properly excluded. The complaint of appellant that the court erred in excluding the testimony of Otto Haas to the effect that appellee at one time came to his office from Lang's, and without getting out of his buggy, turned right around and drove to appellant's house, is not well founded, for the reason that the witness showed in his examination he did not know whence appellee came at that time, but was relying on what had been told him by some one else, and it was not shown by any testimony in the case that appellee did, as a matter of fact, at that time come from Lang's.

Appellee's instruction No. 4, which is complained of by appellant, stated in general terms the duty devolving upon physicians to adopt methods to prevent the spread of small-pox and could, by reason of being general in its terms and not specifically applied to the case, have been refused by the court. It, however, stated a general principle of law correctly, and the court committed no error in giving it.

There was evidence on the part of appellant tending to show that appellee did not take reasonable precautions and exercise reasonable care after leaving the house of Lang and before visiting appellant's wife, to prevent the spread of the disease, and also that appel-

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lant and his said minor children were not exposed to the disease in any other way than through appellee. On the other hand, the evidence on the part of appellee tended to show that he took every reasonable precaution and care, by the removal of clothing worn at the house of Lang, by fumigation and the use of disinfectants, to prevent the spread of the disease before calling on appellant's wife, and also that appellant and his children were exposed to the disease through others than appellee, from whom they may have contracted it.

We are content with the finding of the jury upon the facts, and as the record discloses no errors of substantial importance in the trial of the cause, the judgment of the court below will be affirmed.

Affirmed.

St. Louis, Iron Mountain & Southern Railway Company v. George Fankboner.

1. *LIVE STOCK—duty of owner of, using land near railroad track.* It is the duty of a person, who is using land near a railroad track for his stock and accustomed to pass over a farm crossing near at hand, where his stock may, if the gates are left open, pass upon the track, to keep the gates closed in passing back and forth over the track; and if, by reason of his failure to do so, his stock goes upon the track and is injured, he cannot recover damages therefor from the railroad company in the absence of wilfulness on the part of the employees of the company.

Action in case. Appeal from the Circuit Court of Jackson county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

HERBERT & LEVY and FORMAN & WHITNEL, for appellant.

McELVAIN & GLENN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Appellee, who is a farmer of Jackson county, Illinois, lived in the spring of 1904 on the west side of appellant's railroad, and was engaged in farming land on the east side of the same. He used a road known as the Murphysboro and Grand Tower road, which was a highway running north and south between a quarter and a half mile west of appellant's road, and in going to and from his work was accustomed to turn from this highway into a road or lane from fifteen to twenty-five feet wide running east and across the railroad, at right angles. On the evening of Saturday, May 29th, he left a team with which he had been working in a large pasture east of the railroad, and on the Monday morning following he discovered the horses on the right of way near appellant's said crossing, one dead and the other so badly injured that it had to be killed. He brought suit against appellant and recovered a judgment for \$365, which included \$45 attorney's fees.

There were three counts in the declaration as the case went to the jury. The first charged appellant with a failure to maintain fences on the side of its railroad suitable and sufficient to prevent horses from getting thereon, by means whereof two horses of plaintiff went upon said railroad at a place where such fences were necessary to prevent horses from getting thereon and not where said railroad then and there crossed any public road or highway, nor within the limits of any town, city or village. The second charged negligence on the part of the defendant in failing to maintain cattle guards, suitable to prevent horses from getting upon the railroad at a certain public crossing, and the remaining count charged that defendant failed to maintain and keep the gates at a farm crossing closed, and that by reason of such failure two horses of the plaintiff strayed and went upon the railroad through the open gates at the farm crossing and were struck, etc.

No one saw the horses injured, and it was the theory

of appellee that they got out of the pasture into the road or lane, running east and west, and from thence strayed upon the railroad track, where they were struck by a passing train.

The evidence showed that no cattle guards or wing fences had been constructed at the crossing in question, but that appellant had erected and maintained gates on both sides of the road and that they were sometimes closed and at other times left open. It also appeared there were two other gates along the road which were kept closed about half the time. Appellee introduced evidence for the purpose of showing that the road in question was a public highway, but claimed the right to recover under his declaration, whether the road was a public highway or a private way, and instructions were given to the jury on both theories of the case.

Appellee testified he went to work along the road in question on Wednesday, Thursday, Friday and Saturday preceding the time when the stock was injured, and that on each occasion, both in going to and coming from work, he found and left the gates at the crossing open. Appellee's instruction No. 3 was given upon the theory that the road was a private road and the crossing a farm crossing, and told the jury that it was the duty of the railroad to construct gates and bars at the farm crossing and to use ordinary care to see that said bars were closed and in such condition as to prevent horses from getting onto its road, and if it failed to do so, it was liable for damages done by its engines and cars to horses so getting upon the line of railroad. Appellant contended that appellee could not recover under that part of the declaration, which charged that the road in question was a private way, and therefore the crossing a farm crossing, for the reason that appellee was guilty of contributory negligence in leaving the gates open. The instruction above referred to, omitted all reference to this theory of the case, and told the jury to find for appellee if appellant

had failed to keep the gates closed, regardless of the fact there was evidence tending to show that appellee was negligent in leaving them open himself.

It is the duty of a person, who is using land near a railroad track for his stock and accustomed to pass over a farm crossing near at hand, where his stock may, if the gates are left open, pass upon the track, to keep the gates closed in passing back and forth over the track; and if, by reason of his failure to do so, his stock goes upon the track and is injured, he cannot recover damages therefor from the railroad company in the absence of wilfulness on the part of the employes of the company. *Ranney v. C., B. & Q. R. R. Co.*, 59 Ill. App. 130; *C., B. & Q. R. R. Co. v. Sierer*, 13 Ill. App. 261.

The question whether appellee was guilty of contributory negligence, was an important question of fact for the jury, to be determined from all the circumstances in the case, as shown by the evidence, under proper instructions. The instruction referred to ignored an important element in the case and was improperly given. The same objection in a less degree applies to instruction No. 9 given for appellee.

For the error in instructions above referred to, the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

In the matter of the probate of the will of Mary A. Gowans, deceased.

1. **FREEHOLD**—*Appellate Court has no jurisdiction of appeal involving.* Where, in order to determine an appeal, it is necessary that the Appellate Court pass upon the question as to where the fee title to land lies, a freehold is involved and the Appellate Court is without jurisdiction.

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Contested claim in court of probate. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Appeal dismissed. Opinion filed September 14, 1906.

L. D. TURNER, for appellant.

FREELS & JOYCE, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Mary A. Gowans, who was the owner of several tracts of real estate in St. Clair county, died on June 19, 1905, and shortly afterwards a petition was presented to the Probate Court of St. Clair county, alleging she had left a last will and testament and asking that the same be admitted to probate. A few days later a cross-petition was filed, asking to have certain deeds made by deceased on the same day she executed her will, and found in a box with the will, declared to be a portion of the will and also admitted to probate. The Probate Court admitted the will to probate, but held that the deeds found with the will were not entitled to probate. On appeal to the Circuit Court substantially the same order was made, and the case has been brought to this court for review.

Upon examination of the record we find that the several tracts of land owned by deceased at the time of her death are attempted to be disposed of both by the will admitted to probate and the deeds; that the deeds make a different disposition of the fee in the lands from that made by the will and that neither said probated will nor the deeds dispose of the fee in the same way it would descend under the statute, in the absence of will or conveyances. A determination of the case involves the question of the ownership of the fee in the lands owned by deceased, and consequently involves a freehold. We, therefore, have no jurisdiction of the subject-matter of this cause, and must of our own mo-

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tion dismiss the appeal. *Bice v. Hall*, 21 Ill. App. 298; *Andrews v. Andrews*, 9 Ill. App. 408; *Id.*, 110 Ill. 223.

Leave will be given to appellant to withdraw the record if desired.

Appeal dismissed.

Abe Guggenheim et al. v. Mose Hoffman.

1. **VENDOR AND VENDEE—duty of latter with respect to rejection of merchandise.** It is the duty of a vendee to examine merchandise delivered by a vendor and to accept or reject the same within a reasonable time after receipt.

2. **CUSTOM—when proof of, competent.** A local custom as to the time within which goods purchased are ordinarily examined and accepted or rejected, is competent in an action to recover the purchase price of such goods.

Action in assumpsit. Appeal from the Circuit Court of Marion county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

LOGAN B. SKIPPER, ALBERT D. RODENBERG and CHARLES H. HOLT, for appellants.

J. J. BUNDY, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On November 15, 1904, appellants, who are manufacturers of and wholesale dealers in men's ready-made clothing, in Philadelphia, Pennsylvania, through their traveling salesman, sold to appellee, a retail clothing merchant of Centralia, Illinois, a bill of clothing, amounting to the sum of \$653.50. The goods sold consisted of two-piece light weight men's clothing for summer wear, to be shipped March 15, 1905, dated June 1, 1905, with a discount of seven per cent., if paid within ten days. At the time of the sale, the salesman made

out a written memorandum, showing the lot number, quantity, sizes, price, etc., of the goods purchased, below which was written, "must be as above." The goods were manufactured according to the terms of the order, as claimed by appellants, checked and packed in boxes, shipped to appellee in due season and received by him on March 22, 1905. Appellee states that on receipt of the goods he went through them and kept them in the house. Not having immediate use for the goods, however, he permitted them to remain in the boxes until May 11, 1905, at which time he took them out, and, as he claims, found that a portion of the garments did not comply with the order, for the reason that the sizes did not correspond with those named on the memorandum. On the same day he returned to appellants by freight a portion of the goods and wrote them a letter notifying them of that fact, and saying: "I regret very much that the order was filled contrary to instructions. I gave your salesman scale of pants wanted with coats, and since they did not come as desired, I am returning as above." Appellants refused to receive the goods and wrote appellee saying: "If you had advised upon receipt of these goods that there were some changes to be made, we would have given the matter our prompt attention, as it is our will at all times to be of service to our customers, and please them at each instance, but asking us at this late day, when our season is over and yours just beginning, to accept the return of half your original shipment, is rather unreasonable, and as stated above, we will absolutely refuse the acceptance of the goods and have so informed the transportation company, for they are your property, and at maturity of the invoice we will look for your remittance for the full amount of the bill."

On June 12, 1905, appellee sent appellants a check for \$341.55 in payment of the bill, less \$286.25, the amount of the merchandise returned and the discount of \$25.70, but appellants refused to accept the check and returned the same to appellee. Afterwards appel-

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lants brought suit in assumpsit for the full amount of their bill. To the declaration, which consisted of a special count upon the contract and the common counts, appellee pleaded the general issue and a tender of \$341.55. A jury having been waived, the court found for appellee as to the excess of the claim over the amount tendered, and gave judgment against appellants for costs.

The most important question presented by this record and the one to which the arguments on both sides of the case are almost wholly confined, is, did appellee retain the goods shipped him an unreasonable length of time before notifying appellants and returning such goods as he claimed did not correspond with the order? As a general rule it is the duty of a purchaser to examine the goods purchased within a reasonable time after their receipt by him, and immediately upon discovering that they are not of the character called for by the contract, to so notify the vendor. The question as to what constitutes a reasonable time in a particular case, depends upon the circumstances surrounding the case as established by the evidence. *Doane v. Dunham*, 65 Ill. 512; *Underwood v. Wolf*, 131 id. 425.

One of the most important factors in determining whether the particular time was reasonable or not, in cases such as this, is the existing usage or custom relating to such trade. "While usages of trade cannot be set up to contravene established rules of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business without particular stipulations, express or implied, are presumed to be made in reference to any existing usage or custom, relating to such trade; and persons dealing therein will be held as intending that the business should be conducted according to such general usage and custom." *Chisholm v. Beamon Com. Co.*, 160 Ill. 101; *Samuels v. Oliver*, 130 id. 73; *Lonergan v. Stewart*, 55 id. 44.

Witnesses residing in Centralia testified on behalf

of appellants, that the custom and usage of trade between manufacturers and wholesalers of merchandise and retailers, was that goods received by the retailers should be inspected and unsatisfactory goods returned or claims for shortages made within five to ten days after the receipt of the goods. To meet this evidence, appellee was permitted, over the objection of appellants, to testify concerning his own particular custom in regard to the opening and returning goods, and that he sometimes retained goods as long as two months after receiving them and then opened them up and returned what he found contrary to the order. Two witnesses who had been in the employ of appellee also testified, over the objections of appellants to the same effect, concerning the custom of appellee. It was not shown that appellants knew of the custom of appellee in the particular in question and with that knowledge sold him the goods; consequently it must be presumed that both parties dealt according to the known general custom and usages of that market. The question was not what the custom of appellee was, but what was the general custom and usage of the market at Centralia. While it was proper to prove the general custom of the trade, evidence of the private practice of appellee, of which appellants had no notice, was not competent. *Catlin v. Traders Ins. Co.*, 83 Ill. App. 40.

For the error in admitting appellee's evidence concerning his private practice in regard to the examination of goods purchased by him, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Godair v. Ham Nat. Bank.

W. H. Godair et al. v. Ham National Bank.

1. TELEPHONE CONVERSATIONS—*when competent*. Telephone conversations may be competent notwithstanding the voice of the person carrying on the conversation cannot be identified.

Action in assumpsit. Error to the Circuit Court of Jefferson county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

JONES, JONES & HOCKER and WILLIAM H. GREEN, for plaintiffs in error.

H. CLAY HORNER and ALBERT WATSON, for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action of assumpsit brought by the Ham National Bank of Mt. Vernon against W. H. Godair, A. G. Godair and E. C. Gibson, partners, doing business under the name of the Godair Commission Company, and Samuel L. Moreland, upon two drafts or bills of exchange drawn by S. L. Moreland, upon the commission company in favor of said Ham National Bank, for the sum of \$500 each, one dated November 4 and the other November 6, 1903, and both protested for non-payment.

The verdict and judgment in the court below were in favor of the bank, and the defeated parties bring the case here by writ of error.

It appears from the evidence in the record that S. L. Moreland was a stock buyer and shipper in Jefferson county, Illinois, and some time prior to the giving of the drafts in question entered into an arrangement with plaintiffs in error, by which he was to purchase stock and ship to them, and they were to pay drafts drawn by him upon them to furnish money

to carry on his business. This agreement was communicated by Moreland to defendant in error, and it undertook to cash the drafts drawn by Moreland upon plaintiffs in error, and did so for more than a year prior to the date of the drafts in question. The manner in which the business was conducted was for Moreland to draw his checks upon the bank, and when the over-draft amounted to \$500 the officers of the bank would fill that amount in a draft upon plaintiffs in error, using a blank signed by Moreland, a number of which he left at the bank for that purpose, and send the same to a St. Louis bank for collection. No bills of lading were sent with the drafts or exhibited to the officers of the bank. For more than a year plaintiffs in error promptly honored all such drafts drawn upon them. Moreland appears to have gotten behind in his accounts with plaintiffs in error, and becoming uneasy about the matter, they, on November 6th, sent appellant Gibson, one of the firm, to Mt. Vernon to investigate Moreland's financial standing. Gibson called at the banking house of defendant in error and talked with the officers of the bank about Mr. Moreland's responsibility and standing in the community and reputation for business probity, and afterwards went to the village of Ina, where Mr. Moreland lived, returning to the bank in the afternoon when he told the officers that he "was satisfied with his business down there and that Mr. Moreland was straight and honest." Some conversation was had concerning the fact that a draft of Mooreland's of \$500 on November 4th had already been sent for collection, and at the same time Gibson was told by the cashier that another draft had been sent that day to pay checks by Moreland, a number of which had come in the same day. Gibson then said to the cashier, "Well, I will give you instructions not to send any more and not to forward any more. We will not honor any more drafts." The two drafts last mentioned were not honored, one being protested the day Gibson was at Mt. Vernon and the

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other the next day, and it was for them this suit was brought. Defendant in error relied upon a promise made by plaintiffs in error to Moreland and communicated to it by Moreland, to accept and pay the drafts which Moreland should draw upon them in the course of their business.

Plaintiffs in error insist that the defendant in error was not entitled to recover, for the reason that the only agreement shown to have been made between Moreland and plaintiffs in error was, that they would cash drafts on shipments of stock and not otherwise, and that the drafts sued on were not covered by shipments or given on account of purchases of stock for shipment.

Moreland testified that he had conversations with plaintiffs in error A. G. Godair and E. C. Gibson and their bookkeeper; that Gibson and the bookkeeper told him "to go ahead and buy the stuff and they would take care of the drafts;" that Godair "told me he would pay the drafts;" that he had frequent conversations with Godair in which Godair always said he would pay the drafts.

On the other hand plaintiff in error A. G. Godair testified that he never made any arrangement to take care of Moreland's drafts in relation to his shipping cattle and that his company did not make such an arrangement. Plaintiff in error Gibson also testified that he never made any arrangement or contract with Moreland with reference to paying drafts that might be drawn by him on witness or the firm; that he never had any conversation with Moreland in reference to an agreement or arrangement about Moreland making drafts and the firm honoring them. It is not questioned that Moreland told the officers of the bank he had an arrangement with plaintiffs in error to draw sight drafts against them to pay for stock, and that the stock was to be shipped to plaintiffs in error from time to time; or that Moreland said he had an arrangement and they

told him to draw drafts and they would protect him and to ship the stuff to them. The testimony of Moreland upon the subject was corroborated by the course of business between the parties interested, as for more than a year after the conversation is alleged by Moreland to have taken place, he purchased stock and the firm cashed the drafts in accordance with the arrangements said by Moreland to have been made.

The drafts which are sued upon in this case were drawn in the usual course of business between the several parties in interest, and the action of Moreland in drawing them appears also to have been ratified by plaintiff in error Gibson, at the time of his visit to Mt. Vernon. The proofs in the case clearly supported the verdict of the jury in favor of defendants in error.

Plaintiffs in error insist that the court erred in permitting the witness Grant, who was cashier of the bank at the time Moreland began to draw drafts upon plaintiffs in error, to testify concerning a telephone conversation claimed to have been had by him with some one connected with the Godair Commission Company, who answered to a call for Mr. Godair, in reference to the payment of certain drafts for cattle which Moreland expected to ship a few weeks later. A. G. Godair denied that such conversation was had with him and also testified that W. H. Godair had no connection with the detail work of the office and never took part in the management of the business. While Grant was not able to identify the voice of the person at the other end of the 'phone, yet as he had called up the office of plaintiffs in error and had the conversation with some one there who professed to have authority to act for the commission firm, we are of opinion that while not conclusive, it was at least a *prima facie* showing of a conversation with some one connected with the office of plaintiffs in error, and it was for the jury to say what weight should be given to it in view of all the evidence in the case. *R. I. & P. Ry. Co. v. Potter*, 36 Ill. App. 590.

Farmer v. Mitchell.

The instructions given by the court announced the law governing the case to the jury with substantial accuracy.

The judgment of the court below will be affirmed.

Affirmed.

William Farmer v. John W. Mitchell.

1. INTEREST—*when allowance of, excessive.* An allowance of eight per cent. interest upon an obligation subject to the interest laws in force in 1866, is excessive where such obligation was not evidenced by a writing.

Action commenced before justice of the peace. Error to the Circuit Court of Saline county; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

WHITLEY & SOMERS, for plaintiff in error.

SIGEL CAPEL, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Plaintiff in error has sued out a writ of error in this case to review a judgment entered against him by the Circuit Court of Saline county in favor of defendant in error for \$160. The suit was commenced before a justice of the peace, March 2, 1904, and an appeal taken from the judgment entered by the justice, to the Circuit Court, where a jury was waived and a trial had before the court.

Upon the trial in the court below, defendant in error testified that the claim was for the balance due him for the purchase price of a span of mules, which he had sold to plaintiff in error some eighteen years prior to the time suit was instituted; that at the time of the sale he made an entry of the transaction in a book of ac-

counts kept by him, which was introduced in evidence and read as follows: "1886. William Farmer, Dr. May 1st, to one pair of mules, to pay 8 per cent. interest, \$160; May 20, 1886, by cash \$37; June 18, 1886, by cash \$30; May 21, 1887, by cash \$30;" that no payments were ever made on the indebtedness by plaintiff in error, except those entered upon the book as above set forth. It thus appeared that the last payment was made nearly seventeen years prior to the time of the bringing of the suit.

Plaintiff in error testified that he had paid the debt in full, but the principal controversy between the parties was whether the balance of the debt and the interest, having been barred by the Statute of Limitations, was revived by a new promise to pay, claimed to have been made by plaintiff in error to one Simp Pierson, whom Mitchell said he appointed to collect the debt for him. The conversation relied upon by defendant in error took place in a saloon at Harrisburg, Illinois, some ten days before this suit was commenced, and the only witness who testified to it on behalf of defendant in error was a person who afterwards acted as attorney for defendant in error in bringing the suit before the justice of the peace. Pierson, to whom the promise is said to have been made, was not a witness in the case, and plaintiff in error denied using the language accredited to him by the witness above referred to. The evidence as to the circumstances surrounding the alleged conversation was such as to render the testimony regarding the same of an unsatisfactory nature. But we will not further discuss it, for the reason that this case must be reversed and remanded for another reason.

The court, in determining the amount of the judgment, allowed interest on the indebtedness from May 1, 1886, at the rate of eight per cent. per annum. The statute which was in existence at the time this debt was incurred, fixed six per cent. as the legal rate of interest, but provided that it should be lawful for par-

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ties to stipulate or agree in written contracts for the payment of eight per cent. per annum or any less sum. There was no written contract in this case, and therefore the debt could in no event draw interest at the rate of eight per cent. per annum and it was error in the court to allow interest at that rate. The judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Chicago & Alton Railway Company v. Joseph Watsker.

1. VERDICT—*when not excessive.* A verdict for \$4,316.75 held not excessive, where the plaintiff at the time of his injury was of the age of twenty-four years and earning \$1.50 per day, had never before that time required the attention of a physician, and was in consequence of the injury incapacitated for work for six months, and received injuries which might be permanent.

Action in case for personal injuries. Appeal from the Circuit Court of Madison county; the Hon. BENJAMIN R. BURBROUGHS, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

CHARLES E. WISE, for appellant; F. S. WINSTON, of counsel.

JOHN J. BRENHOLT, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On October 10, 1904, appellee, Joseph Watsker, was assisting in hauling lumber from Alton to a point a few miles east of that place, where a bridge was being constructed across a stream known as Wood river. On the day named appellee, with Joseph Ursch, took a load of lumber to the river to be used for bridge purposes, and after unloading the same, at about ten o'clock

A. M., started back to Alton, accompanied by Ambrose and Roswell Bibb and M. L. Lancaster. The wagon contained no bed and was drawn by two horses driven by Ursch. It was raining a little or misting, and appellee was sitting upon the "hounds" of the wagon holding an umbrella over his head. North of and near to the road traveled by appellee and his party is located the railroad tracks of appellant which for more than a mile west of the river run nearly east and west. About half a mile west of the river the railroad track is crossed by a public highway, running north and south. From the place where the lumber was unloaded, the wagon road runs in a northwesterly direction, until it reaches a point near appellant's right of way some 610 feet east of the highway above mentioned, and from thence runs west nearly parallel with appellant's railroad track, along or near to the south line of the right of way. As the team reached the railroad track at the crossing, the parties on the wagon realized that a train was approaching, and the driver suddenly started the horses and cleared the track in safety, but appellee, in his excitement, jumped from the wagon while it was on the crossing, fell upon the track, was struck by the engine and was seriously injured. He brought suit against appellant for the damages received by him, and obtained judgment for \$4,316.75, from which the railway company appeals to this court.

The negligence charged by appellee, in his declaration, was that appellant was running its train at a high and dangerous rate of speed, and that the statutory signals were not given in approaching the highway crossing. Appellant insists that appellee failed to prove the negligence alleged in his declaration, that the evidence did not tend to prove that appellee was in the exercise of ordinary care at the time of the injury, that the verdict was excessive and that the court erred in refusing certain instructions offered by it.

The uncontradicted evidence was that the train was running about forty-five miles an hour, but there was

the usual controversy as to whether the whistle was sounded or bell rung, as provided for by the statute. The engineer and fireman both swore that the whistle was sounded for the road crossing and that the bell, which was provided with an automatic bell ringer, rang from the time the train left the Alton passenger station, until after it passed the crossing where appellee was struck. The flagman on the train also swore that the whistle was sounded for the crossing.

On the other hand appellee testified that up to the time he was struck there was no sound of either whistle or bell. In this statement appellee is corroborated to a greater or less extent by eight witnesses, some of whom were on the wagon with him at the time he was injured, and the others near at hand.

Upon the question as to whether appellee was in the exercise of ordinary care just before and at the time of the injury, appellee swore that in approaching the crossing where the road turned north into the highway along the line of the right of way, he looked and listened for the train, but that he could neither see nor hear it. It also appeared there was a hedge fence along the right of way, commencing at a point 693 feet west of the crossing, running west from that point some distance, and also running south from the same point for a considerable distance. Several witnesses, including appellee, testified that immediately west of the highway on the south side of the railroad right of way, there was a field of standing corn, while a photograph which appellant caused to be taken two days later, showed the corn standing in shocks in the field. This was apparently explained by the witness Herman Tuethan, who swore that the corn was being cut at the time of the injury and that there were then a few shocks cut. It was for the jury to find from the evidence in the case, whether the statutory signals were given and whether appellee was in the exercise of ordinary care just before and at the time he was injured,

and we are not at liberty to disturb their findings on those questions, under the conditions shown by the record in this case.

At the time he was injured, appellee was an able-bodied man twenty-four years of age, who had never required the attention of a physician in his life and was making \$1.50 a day. When struck by appellant's engine, his right leg was broken, right knee joint severely injured, right wrist sprained and left ankle bruised. He was taken to a hospital, where he remained seven weeks, for twenty-nine days of which he was confined to his bed. He was unable to go to work for six months. At the time of the trial, some eight months after the injury, his right leg was a little shorter than the other and his right knee stiff. One of the two physicians examined, testified that the injury was permanent, and another, who was surgeon for appellant, testified that he could not say positively that "his injury is not permanent." While the verdict in this case was a large one, yet in view of the facts we cannot say it was so excessive as to warrant the belief that it was the result of prejudice, passion or any improper motive on the part of the jury, and it should, therefore, be permitted to stand.

Complaint is made that seven instructions offered by appellant were refused by the court. The first of these instructions referred to the necessity of proof of ordinary care on the part of the plaintiff at the time of the injury, to entitle him to recover. The instruction laid down a correct principle of law, but as the court gave five other instructions for appellant covering the same ground, one of which was very similar in terms to the instruction refused, it was not error for the court to refuse the instruction named. Two other of the refused instructions also referred in different ways to the necessity of ordinary care and caution on the part of plaintiff, which was fully covered by the instructions given. The other refused instruc-

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tions were either covered in principle by those given, or were incorrect in substance.

The judgment of the court below will be affirmed.

Affirmed.

Ellen M. Watt v. Fred Schlafly.

1. **QUESTION OF LAW**—*when not presented for review.* In a case tried before the court without a jury, no questions of law are presented for review where no propositions of law were submitted to the court and no exceptions to rulings on the evidence were reserved.

Action in assumpsit. Appeal from the Circuit Court of Clinton county; the Hon. THUMAN E. AMES, Judge, presiding. Heard in this court at the February term, 1906. **Affirmed.** Opinion filed September 14, 1906.

W. L. COLEY, for appellant.

THOMAS E. FORD, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is a suit brought by appellant against appellee, to recover \$500 deposited with him, by her, to protect him as a surety on an attachment bond given by her. Upon the trial a jury was waived, and the court, having found in favor of appellee, gave judgment against appellant for costs.

The proofs in the record show that on September 24, 1902, appellant began an attachment suit against William DeFord in the Circuit Court of Clinton county, Illinois; that attorneys for appellant requested appellee to go on the attachment bond for \$600 as surety for appellant, which he did, and they deposited with him \$500 to protect him; that the attachment writ was executed by levying on certain chattel property owned by DeFord; that afterwards she dismissed her attachment suit; that on April 15, 1903, suit was brought on

the attachment bond and summons issued against appellant and appellee; that appellee was served, but the summons against appellant, which was issued to another county, was never returned; that neither appellant nor appellee appeared to defend the suit, and judgment was entered against appellee by default for the amount of the bond, \$600, as damages, and it was further ordered that the appellant, Ellen M. Watt, pay the costs of suit, and that execution issue therefor, which judgment appellee afterwards compromised or settled for \$500; that shortly after the payment was made appellant wrote to appellee saying she had heard there was a suit on the bond, asking if it were true and whether he had paid over the money, \$500, and at the same time she complained of her attorneys for not looking after the suit; that appellee replied, that by order of court he had paid \$500 to attorneys for the plaintiff in that suit, for which he held their receipt in full of judgment and costs; that appellant then brought suit to recover the \$500 she had deposited with appellee. It was shown by affidavit on file in the suit that appellant was a non-resident of the state. There was no proof of collusion on the part of appellee with the plaintiff in the suit on the bond, to defraud or injure appellant, nor does it appear that he acted otherwise than in the best of faith in the whole transaction. Appellee testified that he relied on appellant's attorney to make whatever defense there was, if any, to the suit on the bond, and that he knew absolutely nothing about the merits of the case. Appellant excepted to the finding of the court and also to the judgment in favor of appellee, but failed to present to the court any propositions of law. No question was raised concerning the admission or rejection of evidence or the conduct of the trial, consequently the only question presented to us is, was the evidence sufficient to sustain the judgment. *Alsop v. O. & M. Ry. Co.*, 19 Ill. App. 292; *Smith v. Daue*, 29 id. 290; *Flood v. Leonard*, 44

id. 113; First National Bank v. Danville B. & T. Works, 91 id. 116; Mullin v. Johnson, 98 id. 621.

Appellant claims that as the evidence showed she had deposited \$500 of her money with appellee, which had never been repaid to her, she was entitled to recover the same in this suit. The attachment bond which appellee signed with her contained the following provision: "Now, if said Ellen M. Watt shall prosecute her said suit with effect, or in case of failure therein shall well and truly pay and satisfy said William DeFord all such costs in said suit and such damages as shall be awarded against the said Ellen M. Watt, — heirs, executors or administrators in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void," etc.

Sufficient appears from all the proof in the case to show that the \$500 were deposited with appellee to save him harmless as surety upon the attachment bond of appellant, although the details are not made plain. Appellant failed to prosecute her attachment suit with effect, but as shown by the declaration in the suit on the bond, introduced by appellant, the writ of attachment was quashed on her motion and costs adjudged against her in the attachment suit, to the amount of \$108.70. There was no appeal from this judgment for costs against appellant, and for that amount, in any event, both appellant and appellee were liable on the attachment bond. Appellant was, therefore, plainly not entitled to recover her \$500 until she had relieved appellee from all danger of having to pay those costs.

Damages were awarded by the judgment in the suit on the bond against appellee alone, and that part of the judgment which ordered that appellant pay the costs of suit was improper and erroneous, for the reason that appellant had not been served with summons or entered appearance in the cause. Appellant insists that there could be no liability on the part of either

appellant or appellee until there was an award of damages against her, and that therefore the judgment against appellee for damages was also erroneous and could easily have been prevented had appellee defended the suit. We do not think this position tenable. If it were, attachment bonds given by non-resident principals with resident sureties would in most cases be practically of no effect, as it is seldom possible, in suits on such bonds, to procure service of process on the non-resident principals. If in the absence of such service on, or an entry of appearance by, the principal, no judgment could be obtained against either principal or surety, judgment in suits on such bonds could be seldom if ever obtained.

We are of opinion, that notwithstanding the failure to obtain service on the principal, judgment in such suit may be rendered against the surety where a breach of the conditions of the bond is shown.

The deposit of \$500 was evidently made by appellant to indemnify appellee from loss in going on her attachment bond. He suffered loss by reason of the judgment against him in the suit on the bond, and under the terms of the contract between them he had a right to use the fund deposited with him to indemnify him for the loss so sustained by him.

If appellant could be permitted in this collateral suit to take advantage of the fact that the judgment was entered against appellee in the suit on the bond by default, yet it would nevertheless be her duty to show to what extent she was injured by appellee's failure to make a defense to that suit. This, however, she wholly failed to do. We are of opinion the judgment of the court below was correct, and it will accordingly be affirmed.

Affirmed.

Haagen v. Globe Printing Co.

E. C. Haagen et al. v. Globe Printing Company.

1. **BILL OF EXCEPTIONS**—*effect where, does not purport to contain all the evidence.* If the bill of exceptions does not purport to contain all the evidence, it will be presumed that the trial court found the facts correctly.

2. **ASSIGNMENT OF ERRORS**—*effect of absence of.* No review will be undertaken where no errors have been assigned, and this notwithstanding their absence has not been pointed out by counsel for the appellee.

Action of debt. Appeal from the Circuit Court of Madison county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

C. W. TERRY, for appellants.

W. P. EARLY, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

In this case appellee brought suit in an action of debt, against appellants, setting out in its declaration a written statement or agreement, signed by one Victor E. Harlow, dated at Alton, Illinois, August 1, 1903, by which Harlow undertook to act as news dealer and circulator in Alton, Madison county, Illinois, for the St. Louis Globe-Democrat, published by the Globe Printing Company, of St. Louis, Missouri, for at least six months from date, to pay all bills by the tenth of each month for papers furnished during the preceding month, no unsold copies of the paper to be returned, to deliver papers to subscribers promptly on arrival each day, and upon the termination of the agreement, from violation of its terms or otherwise, to furnish the Globe Printing Company a full list of all subscribers to the Globe-Democrat. The declaration also set out a certain bond dated at Alton, Illinois, August 11, 1903,

and signed by appellants, E. C. Haagen and J. V. E. Marsh, by which they undertook to become individually and jointly responsible to appellee, for whatever amount might become due it for papers furnished by it from time to time to said Harlow in Alton, Madison county, Illinois, provided the amount was not settled by Harlow according to the terms of the agreement above mentioned; also to be responsible for any loss or damage sustained by appellee on account of any violation of said agreement on the part of said Harlow. The declaration further avers that in accordance with said agreement appellee furnished papers to said Harlow up to March 10, 1904, amounting to the sum of \$327.22, which amount was due and payable on said date by the terms of said agreement; that payment of said sum of money was not made by Harlow according to the terms of the agreement, although repeated demands were made upon him for payment of said amount.

To this declaration appellants filed a plea of *non debet* and also certain special pleas, setting up that appellee was a foreign corporation, organized under the laws of Missouri, doing business for gain, and was, at and before the filing of the suit, doing business in Illinois and had not complied with any of the requirements of the laws relating to foreign corporations doing business in the State of Illinois; that appellee was a corporation organized for pecuniary profit and not a railroad or telegraph company, nor in the business of insurance, banking or loaning money. A jury was waived and a trial had before the court, which resulted in a judgment in favor of appellee for \$318.77, from which an appeal was taken to this court by the defendants below.

Appellants seek by their argument to raise questions of law and fact, which they insist demand a reversal of the judgment. At the commencement of our investigation of the record, however, we are met by the fact that the bill of exceptions does not purport to contain all the evidence in the case. The court below must,

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therefore, be presumed to have found the facts correctly, and such finding cannot be examined into or questioned in this court. *C., R. I. & P. Ry. Co. v. Calumet*, 151 Ill. 512; *Hermann v. Pardridge*, 79 id. 471; *Kern v. Strasberger*, 71 id. 303; *Rich v. Hathaway*, 18 id. 548.

A still more serious matter, however, is the entire absence of any assignment of errors upon the record. Where there is no assignment of errors there is nothing for a reviewing court to consider. *Cessna v. Benedict*, 98 Ill. App. 440; *Lancaster v. W. & S. W. Ry. Co.*, 132 Ill. 492.

It is true that appellee in this case does not raise the question of the failure of appellants to assign errors upon the record, but that is immaterial, as an assignment of errors is not a mere matter of form to be considered waived if not objected to, but one of substance, and its absence cannot be ignored by the reviewing court, even though it should appear, as it does in this case, that an assignment of errors is set forth in appellants' abstract. *Aetna Life Insurance Company v. Sanford*, 197 Ill. 310; *Ditch v. Sennott*, 116 id. 288; *Davis v. Lang*, 153 id. 175; *Williston v. Fisher*, 28 id. 43.

We have, however, examined the record and briefs filed in this case, and if we were at liberty to pass upon the questions raised by appellants, we would be constrained to affirm the case upon its merits.

The judgment of the court below will be affirmed.

Affirmed.

Village of Palestine v. X. F. Siler, Administrator.

1. NEGLIGENCE—*municipal corporation conducting lighting plant liable for.* Municipal corporations, such as cities and villages, are, as distinguished from counties and towns, liable for negligence resulting in personal injuries arising from the conduct of municipal lighting plants.

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Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Crawford county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

ABE L. MAC HATTON, CALLAHAN & JONES and EAGLETON & BAKER, for appellant.

BRADBURY & MAC HATTON and MAXWELL & JONES, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Appellee brings this suit as administrator of Lee H. Stout, deceased, to recover damages for the death of his intestate, alleged to have been caused by the negligence of the Village of Palestine in the maintenance of certain wires in the streets of the village, used in connection with a system of electric lighting. There was a verdict against the village for \$2,000, to review which it has appealed to this court.

There is very little contention as to the facts in the case. It was shown by the evidence that appellant maintained an electric light plant, which was used for the purpose of lighting its public streets, and also furnished lights for some of the residences of its inhabitants. One of the street lights was placed at the intersection of Grand Prairie and Wilson streets, suspended from wires attached to poles, located at diagonal corners at the intersection of the streets, one at the southwest and the other at the northwest corner. These poles were twenty-five feet high and the electric light wires running from the plant to the lamps were attached to pins furnished with glass insulators, fastened on cross-arms, near the tops of the poles. From a point about a foot below the cross-arm on the electric light pole, located near the southeast corner of the intersection of said streets, an insulated guy wire extended diagonally across the sidewalk in a south-

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easterly direction, to another pole located some forty inches south of the sidewalk and one foot west of the east line of Wilson street, to which the wire was attached about five feet from the ground. Some days previous to the time of the injury, the pin holding one of the electric light wires to the arm on the pole last mentioned became broken, and the wire, with the insulator attached, dropped down on the guy wire, the insulation on the electric wire became worn and defective and the current of electricity passed therefrom to the guy wire. At about 11:30 P. M. on Saturday, May 25, 1905, Lee H. Stout, who was clerking in the store of Frank Deitz, in the village, was going home in company with his employer, walking west along Grand Prairie street. Stout was on the north side of the walk leading his bicycle with his right hand. As they approached Wilson street, Stout remarked: "That light is not on again to-night;" and near the corner Deitz, who was on the south side of the walk, stopped a moment, passed behind Stout and started in a northwesterly direction across the street. When he had gotten about half way across the street, he saw something like a flash of lightning and heard a rumbling noise, looking back he saw sparks from the guy wire and calling to Stout, received no answer. He then started back and just as he came up to him, saw Stout's right hand slip off the guy wire as he fell beside the post.

There was evidence tending to show that the electric light wire, with the insulator attached, had been down on the guy wires since the previous Thursday; that some boys had received an electric shock by coming in contact with the guy wire early in the evening of the day Stout was injured, and that notice of the defective condition of the wire had been given to O. B. Bagshaw, who had charge of the electric light plant for the village, from one to two hours prior to the injury.

Appellant urges a number of reasons for the reversal of the judgment, but the two matters principally relied upon by it, both of which were raised by proper

pleas to the declaration, are (1) that in lighting the streets it was exercising its authority under the police power given it by statute, and was therefore in so doing not liable for the negligence of its officers; and (2) that the village had no legal right to furnish electric light to private parties for hire; that its acts in so doing were *ultra vires* and that it could not be held liable for the acts of its servants not done within the scope of its corporate powers.

Each count of the declaration set out that the electric light plant was maintained for the dual purpose of lighting the streets of the village and furnishing electric lights for hire to such of the citizens as were using electric lamps, but they do not state specifically for which purpose the defective wires which carried the current which caused the death of Stout were used. Upon the trial, however, it was agreed by the parties, and the agreement made part of the record, that the wire which occasioned the injury to Stout, was one of the wires used by the village for the purpose of lighting the streets. The effect of this stipulation was to eliminate the second proposition above mentioned, still leaving the first for consideration, for if, as agreed upon, the injury was caused by the defect in a wire used in lighting the streets, which was a business the village had a right to engage in, then it is immaterial whether the other business in which the village is said to have been employed in connection with its electric light plant was, or was not, *ultra vires*.

The contention on this subject in appellant's brief is, that in Illinois the code of police powers granted to municipal corporations gives them authority to provide for lighting the streets; that this is "the delegation of one of the powers of the state to a municipal corporation to provide for the general welfare of the people;" that no matter how negligently the state might exercise such a power, it would not be liable in the courts for injuries, and that if the state would not be liable, the municipality, operating under the author-

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ity delegated by the state, is not liable. A distinction, however, is observed, both in the general text-books and in the reports of the higher courts of this state, between the rules applicable to purely municipal corporations such as cities and villages and to counties and towns, upon this question, the cities and villages being held subject to liability, while the counties and towns are held to be exempt from liability. In speaking of the liability of towns our Supreme Court, in the case of *Nagle v. Wakey*, 161 Ill. 387, said: "The reasons always given for exempting towns from such actions (for personal injuries) are, that they are established as local subdivisions and agencies of the state for governmental purposes and that duties are imposed upon them without their assent, exclusively for public purposes;" also, "The courts draw a distinction between the town and the municipal corporation proper, on the question of liability, in favor of the town."

The same question is discussed at some length in the *City of Chicago v. Seben*, 165 Ill. 371, where a number of cases recognizing the distinction are referred to in connection with the following language: "The reason for the distinction as given by this court in the cases above referred to, is that cities and chartered towns and villages act under charters, by which valuable privileges are conferred upon them at their request, these privileges being held to be a consideration for the duties imposed upon them; and for the performance of these duties, like individuals, they must be responsible in an action."

The section of the statute which gives the city and village the power to provide for lighting the streets, also gives them the power to construct and keep in repair culverts; drains, sewers and cesspools and to regulate the use thereof. No good reason appears why a city or village should not be held to the same liability for damages resulting from defects in the means used by it for lighting purposes, as from defects resulting

from the imperfect construction and maintenance of gutters, drains and sewers.

In the *City of Chicago v. Seben*, *supra*, the plaintiff brought suit for personal injuries incurred by stepping into a sewer inlet, which it was alleged the city had negligently permitted to remain open and uncovered. In discussing the question of the liability of the city for injuries so caused, the same opinion contains the following language: "It has been said, that the work of constructing gutters, drains and sewers is ministerial, and that the corporation is responsible in civil actions for damages caused by the careless or unskillful manner of performing the work. (2 Dillon on Mun. Corp., sec. 1049.)

It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair, and such duty is not discretionary, but purely ministerial. (1 Shearman & Redfield on Negligence, sec. 287; 2 Dillon on Mun. Corp., sec. 1049.) The adoption of a general plan of sewerage involves the performance of a duty of a *quasi*-judicial character, but the construction and regulation of sewers and the keeping of them in repair, after the adoption of such general plan, are ministerial duties, and the municipality, which constructs and owns such sewers, is liable for the negligent performance of such duties. (1 Beach on Public Corp., sec. 766; *Johnston v. District of Columbia*, 118 U. S. 19; *Seifert v. Brooklyn*, 101 N. Y. 136.)"

The same section of the statute also provides for establishing sidewalks. Reported cases, almost without number, establish the right of one injured by the defective construction or imperfect maintenance of a sidewalk, to bring suit for personal injuries. It appears to us that a city or village should be and is bound to the same care in maintaining the appliances used for lighting its streets, that it is in maintaining its sidewalks, used by pedestrians in traversing the streets. Whether the city had actual or constructive

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notice of the condition of the wire, and whether deceased was in the exercise of due care and caution for his own safety previous to and at the time of the injury, were questions of fact for the consideration of the jury under the evidence, and we are content with their verdict on those questions. The instructions as a series, stated the law applicable to the case with substantial accuracy and contained no material error.

The judgment of the court below is affirmed.

Affirmed.

Illinois Southern Railway Company v. William Hayer.

1. DEGREE OF CARE—*what, required in emergencies.* One cannot be expected to exercise the same degree of care and judgment in emergencies as under ordinary circumstances.

2. PHOTOGRAPHS—*when admission of, not erroneous.* The admission of photographs showing in part the scene of the accident, is not erroneous where the omitted portion is made the subject of evidence.

Action in case for personal injuries. Appeal from the Circuit Court of Randolph county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

WILLIAM SCHUERK, L. M. KAGY and R. J. GODDARD, for appellant; E. C. RITSHER and W. T. ABBOTT, of counsel.

H. CLAY HORNER, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Appellee brought this suit to recover damages for personal injuries, sustained by him by reason of his having been thrown from a wagon while driving along a public highway, approaching a crossing of appellant's tracks near Sparta, Illinois.

The declaration charges in one count that appellant's servants, in charge of a locomotive engine upon its railroad track, failed to ring the bell or sound the whistle at a distance of eighty rods from the crossing, and to keep the bell ringing or whistle sounding until the crossing was reached, and that in consequence of such neglect the locomotive and the train attached to it ran so suddenly and rapidly near to appellee's wagon and team as to cause the team to suddenly turn around, cramp and overturn the wagon and throw plaintiff violently to the ground. Another count charged failure on the part of appellant to construct and maintain its highway crossing and approaches thereto within the right of way, so that they would be at all times safe for persons and property, and still another count was based upon the statute requiring railroad companies, on crossing public highways, to restore the highway to its former state, or to such state as not to unnecessarily impair its usefulness, and charges that by reason of appellant's failure to comply with the statute appellee was injured.

There was a trial by jury in the court below, which resulted in a verdict and judgment in favor of appellee.

The crossing where the injury occurred is about a mile from Sparta, and the highway in that locality runs east and west, crossing the railroad, which runs somewhat northeast and southwest, at a sharp angle, so that a person approaching the crossing from the west in the middle of the highway would be only about twenty feet from the railroad track when he was 100 feet from the point where the traveled track crossed the railway. A few feet west of the center of the crossing, there is another road, leading north from and at right angles to the highway, known as the Boyd road. From the time of the construction of the railroad, there had always been considerable ascent both on the highway and the Boyd road from the level ground to the railroad crossing, and some two or three years before the

injury the main track of the railroad was moved about twenty feet further north on the right of way and the new track raised some six and one-half feet higher than the old track. At the same time the approaches from both roads were correspondingly raised, so there was a high bank on each side of the roadway approaching from the west on the highway and also approaching from the north on the Boyd road, leaving a depression of some depth between the approaches of the two wagon roads, the top of the slope at the intersection of the two wagon roads being a little less than twenty feet from the north railroad track. About eighty yards west of the approach on the highway there is a hill, and between that and the crossing, a depression for a considerable distance, so that a train from the east cannot be seen by a person upon the highway, until he is about 100 feet west of the crossing and close to the railroad track, on the south. On October 22, 1904, appellee, a man thirty-three years of age, who lived in the neighborhood, was traveling over the highway towards the east, making his third trip as a mail carrier over the route, driving two horses to a spring wagon. He claims that he stopped and listened for a train at the hill eighty rods west of the crossing, and, discovering none, came on east, and as he reached the top of the slope to the crossing, a train came suddenly towards and facing him from the east and passed within a few feet of his team; that the team became frightened and unmanageable, turned to the left, cramped and upset the wagon and threw him out over the embankment, causing injuries for which he brought suit; that the train passed not over eight feet from the horses and that he could not turn his team around on account of the narrowness of the embankment constructed by appellant, on which he was driving.

Appellant contends that the evidence in the case was not of such a character as to sustain the verdict and judgment in favor of appellee, and that the court erred in certain rulings upon the evidence, and in regard

to the instructions. The evidence upon the question whether the statutory signals were given or not, was conflicting and irreconcilable, and under such circumstances it was for the jury to determine which side was in the right. Whether appellee was in the exercise of ordinary care for his own safety in approaching the crossing, and in his attempted management of the team after they became frightened by the train, was also a question of fact for the jury. One cannot be expected to exercise the same degree of care and judgment in the management of a team in sudden emergency, like that shown by the evidence in this case, that could be expected under ordinary circumstances, and no general rule of conduct can be laid down which the court can say, as a matter of law, must be followed under all conditions. What degree of care is required in approaching a railroad track and in the management of a frightened team, depends upon the circumstances of each case. *C., B. & Q. R. R. Co. v. Pollock*, 195 Ill. 156.

Whether appellant constructed and maintained its highway crossing and approaches thereto within the right of way at the place in controversy, so that at all times they were safe for persons and property, and whether in crossing the public highway it restored the same to its former state, or to such state as not to unnecessarily impair its usefulness, were also questions of fact for the jury. The conditions surrounding the crossing were fully disclosed by the evidence, so that the jury had plenty of data from which to determine whether or not the statute in the cases named had been complied with.

Appellant complains that the court erred in admitting certain photographs in evidence. When they were offered in evidence by appellee, they were objected to by appellant, because, as stated, they did not show or purport to show the conditions at the place where the plaintiff's injury is alleged in his declaration to have occurred. It is true they did not show the level space at the crossing, but they did show portions of the rail-

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road and highway which were involved in the controversy, and concerning which both sides offered evidence. We are of opinion that with the explanation given in connection therewith, there was no error in admitting the photographs in evidence.

There is no error in permitting several witnesses to answer questions concerning the possibility of turning the team around at the crossing, as those questions and answers had bearing upon the question whether the company had constructed and maintained its highway crossings and approaches thereto within the right of way, so that at all times they should be safe for persons and property.

Only two instructions were given for appellee, and appellant makes no objection concerning them. A number of instructions were given on behalf of appellant, which appear to cover fully its theory of the case, and we find nothing in the modification by the court of several instructions and its refusal to give certain others, to warrant the conclusion that there was any substantial error committed by the trial court in regard to the instructions.

The judgment of the court below will be affirmed.

Affirmed.

Catherine Adams v. James J. Douglas, Administrator.

1. **STATUTE OF LIMITATIONS**—*running of, arrested by payments of joint debtor.* Payments made by one joint debtor with the knowledge, consent and ratification of the other, arrest the running of the statute as to both joint debtors.

Contested claim in court of probate. Appeal from the Circuit Court of Randolph county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Reversed and remanded. Opinion filed September 14, 1906.

RALPH E. SPRIGG, for appellant.

A. G. GORDON, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On January 26, 1883, William Ruppert and James P. Adams executed their joint note of that date, for the sum of \$150, payable to Catherine Adams, two years after date with interest at the rate of eight per cent. per annum from date. Certain payments were afterwards from time to time made by Ruppert, and the same were indorsed on the note by Miss Adams as follows: "Interest paid for one year." "Due January 26, 1890, \$120.00." "This note paid up to \$95.80 July 26, 1890." "Paid Nov. 6th, 1896, \$6.00." "Paid May 12th, 1897, \$5.00."

Subsequently James P. Adams died, and afterwards, on May 10, 1904, the note was filed as a claim against his estate, the affidavit of Miss Adams filed therewith stating that there was "due on said note \$95.80 with interest from July 26, 1890, less the credits above mentioned of \$6.00 and \$5.00 made thereafter." The County Court refused to allow the claim, and on appeal to the Circuit Court there was a trial without a jury, a finding in favor of appellee and a judgment against appellant for costs.

The payments made by Ruppert upon the note were sufficient to keep it alive as against him, although more than ten years had elapsed since its maturity; but it is claimed by appellee that notwithstanding such payments, the Statute of Limitations can be invoked as a bar to a recovery upon this claim against the estate of James P. Adams under the facts shown by the evidence, and the question so raised is the only one submitted by the record for the determination of this court.

Appellant offered in support of her case on the trial in the Circuit Court the note in question and the testimony of a witness, L. Adams, a brother of appellant, and the said James P. Adams, deceased. He testified

that he knew of appellant getting Ruppert to do some work for her which was to be credited on the note in 1896; that James P. Adams was at witness' house a few days after the work was done and at that time appellant told James P. that Ruppert had done the work and that she was crediting the work on the note; that James P. told her he wanted her to get all she could out of Ruppert, he said he would have to pay the balance; "to get all she could in work or anything to pay the balance; as near as I can remember he told her to get all she could out of Ruppert, either work or money or anything. He said he would have to pay the note." Witness also testified that in May, 1897, as he was taking his sister to the train, James P. came to the wagon in which they were and paid her \$10 on a note he owed her, at the same time asking her if she had gotten any money out of Ruppert on his note, and that she told him she had gotten \$5 from him just a few days before. He told her Ruppert ought to have given her more money on the note, to collect all she could from him.

In the case of *Granville v. Young*, 85 Ill. App. 167, it is said by the court: "We are of opinion that when payments are made from time to time by one joint debtor, with the knowledge, consent and ratification of the other, the running of the statute is arrested as to both the joint debtors." The doctrine above laid down is approved and adopted by this court in the case of *McDonald v. Weidmer*, 103 Ill App. 390, where the question of the ratification of payments made by a joint maker of a note was under consideration and cases bearing upon the question discussed. In the case last named appellant, when informed by the holder of the note, that the joint maker of a note with him had made a payment upon the same, replied he "was glad of it and hoped he would get all of it out of him," and the court says: "Such language is not the expression of dissent or disapprobation, but is the language of approval and satisfaction. From it appellee would have

been fully warranted in receiving subsequent payments from appellant as authorized and desired by him." It was there held that appellant by the language used by him, as above set forth, assented to and ratified the payment previously made by his joint maker. The language used in this case by appellee when the payment was made by Ruppert upon the note in 1896, tended to show beyond question that James P. assented to the payment already made by Ruppert and fully authorized appellant to receive subsequent payments from him. On being told of the payment made in 1897, James P. said that Ruppert ought to have given appellant more money on the note; and again authorized her to collect all she could from Ruppert. These words expressed no dissent with what had been done and would have authorized her to receive still further payments from Ruppert, had they been offered by him. In any event, appellant was authorized by James P. to receive the payment made in 1897 by his express direction in 1896 to get all she could out of Ruppert, and we are of opinion that the language used by James P. soon after the payment was made in 1896 assented to and ratified the receipt of that payment by appellant.

In accordance with the views above expressed, the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Charles Hertel, County Superintendent, v. Louis Boismenu.

1. COUNTY SUPERINTENDENT—*duty of, to pass upon treasurer's bond.* When the bond of a treasurer is presented for approval to a county superintendent it is his duty to examine it, and if he finds it in all respects to be according to law and the securities

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good and sufficient, to indorse his approval thereon and have it recorded and filed in his office.

2. *MANDAMUS—who not necessary party to proceeding in.* In a proceeding to compel a county superintendent to approve the bond of a person appointed as treasurer for a township, the former treasurer removed by the board of trustees is neither a necessary or proper party to the proceeding.

Mandamus proceeding. Appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

F. J. TECKLENBURG, State's Attorney, L. D. TURNER, and FORMAN & WHITNEL, for appellant.

KEEFE & SULLIVAN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a petition for a writ of *mandamus* filed by appellee against appellant, asking the court to compel the latter to approve, record and file appellee's bond as township treasurer, or if said bond was in any respect defective or the penalty thereof insufficient, to return the same for correction; and in case said bond is approved, recorded and filed as aforesaid, that appellant be required to deliver to appellee, as such township treasurer, a written statement certifying that his bond has been approved and filed and that appellee, as such township treasurer, is entitled to the care and custody, on demand, of all moneys, bonds, mortgages, notes and securities, and all books, papers and property of every description, belonging to said township. Demurrers having been sustained to the answers, five pleas were filed by appellant. The first contained a denial of the appointment of appellee, as treasurer; the second denied there was a vacancy in the office of township treasurer, as alleged in the petition; the third stated that the penalty of the bond presented for approval was insufficient; the fourth that there was no

vacancy in the office of treasurer at the time the bond was presented to appellant; that appellee was not the treasurer, but that Daniel Sullivan was then the treasurer of said township, and that appellant for that reason refused and declined to approve and file the bond and issue a certificate to appellee; the fifth that the said Sullivan was the treasurer of said township; that on April 15, 1905, the trustees attempted to make an order removing him, but that said order was made without authority and without cause, for the reason that the term of said Sullivan had not expired; that he had performed all the necessary duties, had not been guilty of any improper conduct as treasurer, that there was no good or sufficient cause for his removal and that he was competent, able and efficient to perform the duties of said office. A demurrer was sustained to the fifth plea, and issue joined on the others.

Upon the hearing the court found the issues for appellee, and entered an order commanding appellant forthwith to approve, record and file the bond, and deliver to appellee the certificate prayed for in the petition, as above set forth.

On April 15, 1905, the trustees of schools of township No. 2 north range No. 10 west of the third principal meridian in St. Clair county met and organized and by resolution passed and recorded upon the secretary's book, removed from office Daniel Sullivan, the township treasurer, for the reason, as stated in the resolution, "that he is incompetent and unable to personally perform and discharge the duties of said office," and declared said office vacant. Sullivan had been appointed treasurer April 16, 1904, for the term of two years. Appellee prepared and executed a bond as such treasurer in the sum of \$500,000, which was in the same amount as the bond given by his predecessor. The bond was signed by a number of sureties and marked approved, and accepted by two of the trustees. When appellee presented the bond to appellant for approval, he refused to accept it and returned it to appel-

lee. Afterwards appellant wrote a letter to the president of the board of trustees, notifying him that he could not approve the bond, because, in his opinion, the reasons given for the removal of Mr. Sullivan were not statutory reasons; that he considered Mr. Sullivan as still treasurer of the township and did not feel justified under the facts presented and the law, in turning over the money and securities of the district to appellee.

Upon the trial Sullivan testified that he had in his hands as treasurer on April 15, 1905, the sum of \$243,-917.13. This was three days before appellee's bond was executed. Appellant offered to prove by same witness that \$400,000 came into his hands for the year ending April 1, 1905, and that in addition to the amount in his hands as treasurer on April 15, 1905, other moneys had since come into his hand which made a total of over \$400,000 handled by him as treasurer, since that date. The court, however, refused to permit such proof to be made. At the close of the evidence, appellant moved to dismiss the petition for want of proper parties, but the court denied the motion.

Appellant also submitted to the court two propositions of law, one of which requested the court to hold it was the duty of appellee to show that the penalty of the bond presented to appellant for his approval was twice the amount of all bonds, notes, moneys and effects, which should come into his hands while he should act as treasurer, and the other, that Daniel Sullivan was interested in the subject-matter of the litigation and should be made a party thereto, but the court marked both propositions "refused."

The principal points raised and relied upon by appellant, for a reversal of the judgment, are, as claimed by him, that Sullivan was not removed according to law and was therefore still treasurer, so that appellant could not legally approve the bond of appellee as treasurer; that the court erred in not holding that Sullivan was a necessary party to the suit; and that the court

further erred in not holding that the penalty of the bond must be twice the amount of the bonds, notes, mortgages, moneys and effects, which should come to his hands as treasurer, and in refusing to admit evidence tending to show what such amount would be.

Section 51 of the statute in relation to schools (Hurd, 1905) provides that "within ten days after the annual election of trustees, the board shall organize by appointing one of their number president and some person, who shall not be a director or trustee, but who shall be a resident of the township, treasurer if there be a vacancy in this office, who shall be *ex-officio* clerk of the board," and section 52 provides that "the president shall hold his office one year and the treasurer for two years and until their successors are appointed; but either of said officers may be removed by the board for good and sufficient cause." It is insisted by appellant that the reasons given for the removal of Mr. Sullivan were not statutory reasons; that while section 52 of the statute provides that either the president or treasurer may be removed by the board of trustees for good and sufficient cause, without stating what that term includes, yet so far as the treasurer is concerned, the question of removal must be controlled by section 63, which provides that the trustees may remove the treasurer "for any failure or refusal to execute or comply with any order or requisition of said board legally made and entered of record, or for other improper conduct in the discharge of his duty as treasurer;" and that appellant has a right to pass upon these questions and to determine whether Mr. Sullivan was legally removed and appellee legally appointed his successor. The question arises whether appellant can properly refuse to approve the bond of appellee, because in his opinion the removal of Sullivan had not been accomplished according to law.

Section 25 of the same chapter of the statute provides that, "Whenever the bond of any township treasurer approved by the board of trustees of schools, as

required by law, shall be delivered to the county superintendent, he shall carefully examine the same; and, if the instrument is found, in all respects, to be according to law, and the securities good and sufficient, he shall indorse his approval thereon, have it recorded in the circuit clerk's office and file the same with the papers of his office; but, if said bond is in any respect defective, or if the penalty is insufficient, he shall return it for correction. When the bond shall have been duly received and filed, the superintendent shall, on demand, deliver to said township treasurer a written statement certifying that his bond has been approved and filed, and that said township treasurer is entitled to the care and custody, on demand, of all moneys, bonds, mortgages, notes and securities, and all books, papers and property of every description."

No power is given by this, or any other section of the chapter, to the county superintendent, to determine whether the person who so presents his bond approved by the board of trustees has been legally appointed treasurer by the trustees or not. The duty of appointing and removing the treasurer is placed by law upon the trustees, not the county superintendent, and he has no power to determine whether in making such appointment the trustees have proceeded regularly or not. Appellant had no legal power to question the regularity of the removal of the former treasurer and the appointment of the new one. When the bond was presented to him with the approval of the board of trustees, it was his duty to examine it, and if he found it in all respects to be according to law and the securities good and sufficient, to indorse his approval thereon, and have it recorded, and file the same with the papers in his office.

Sullivan, the former treasurer, was not a necessary or proper party to this suit, for the reason that his rights, whatever they may be, to the office or to the property of the district, cannot be here determined. The question whether appellee or Sullivan is the legal

treasurer of the district, is not presented by the pleadings in the case, and is collateral to the real question at issue, which concerns only the right of the superintendent to refuse to approve the treasurer's bond, approved by the board of trustees, and give the certificate required by law.

No question is made concerning the securities, so it is to be presumed that they were "good and sufficient;" but question was made as to the sufficiency of the penalty of the bond. Section 99 of the same chapter of the statute, above referred to, provides that in all cases where the treasurer "is to have the custody of all bonds, mortgages, moneys and effects denominated principal, and belonging to the township, for which he is appointed treasurer, the penalty of said treasurer's bond shall be twice the amount of all bonds, notes, mortgages, moneys and effects." That appellant himself considered the bond sufficient at the time he refused to accept it, is evidenced by the fact that he did not assign insufficiency of penalty as one of the reasons for such refusal.

But regardless of the views which appellant may have had upon the sufficiency of the penalty at the time of his refusal to accept the bond, the proofs showed, as above stated, that three days before the bond was executed there was in the hands of Mr. Sullivan, as treasurer, the sum of \$243,917.13, and as the penalty of the bond was fixed at \$500,000, it would seem that the provision of the law in regard to the penalty had been fully complied with. The court properly refused admission of evidence tending to show that some \$400,000 had come to the hands of Mr. Sullivan during the preceding year, and that a like amount came to his hands after the rejection of the bond by appellant, for the reason that the bond appears to have been sufficient at the time it was executed. If this bond should afterwards, by reason of a greater amount of funds coming into appellee's hands, become insufficient to comply with the law,

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the defect could be remedied, as the same section of the statute last above referred to provides, that "the penalty of said bond shall be increased from time to time as the increase of the amount of notes, bonds, mortgages and effects may require, and whenever, in the judgment of the trustees or county superintendent the security is insufficient."

As the penalty of the bond, which was for the same amount as that given by Mr. Sullivan, was sufficient in amount technically to comply with the law, considering the amount of funds on hand at the time, and as appellant failed to assign insufficiency of penalty as one of the reasons for refusing to accept the bond, the question of the sufficiency of the penalty could not be properly raised upon the trial of this cause.

The order entered by the court below was in accordance with the law under the facts in this case, and the judgment will accordingly be affirmed.

Affirmed.

Welsh Brothers v. John Harvey.

1. COMMENCEMENT OF SUIT—*presentation of claim not essential to.* Presentation of a claim to the debtor for payment is not essential to the right of the creditor either to commence or maintain his suit.

Action commenced before justice of the peace. Appeal from the County Court of Jefferson county; the Hon. CONRAD SCHUL, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

ROBERT M. FARTHING, for appellants.

WILLIAM H. GREEN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

At the time the controversy concerning the matters

involved in this suit arose, appellants were railroad contractors, engaged in grading a portion of the road-bed of a railroad then being constructed through Jefferson county in this state. Appellee was employed by appellants on different occasions, sometimes working with his team and at other times taking contracts to clear portions of the right of way. Some trouble arose between the parties and appellee brought suit before a justice of the peace against appellants, and afterwards in the County Court, to which the cause was appealed; he obtained judgment against appellants for \$52.96.

Appellants claim appellee was not entitled to maintain his suit against them, for the reason that he had not entirely completed his contract and because he demanded payment before bringing suit from one of appellants at a place on the railroad right of way, several miles from appellants' office or camp, and upon being told to go to the office or camp and he would be paid, refused to do so.

Upon the question whether certain contract work which appellee undertook to do, had been fully completed, there was some conflict in the evidence, but it clearly appears that such work was substantially done and that appellants availed themselves of it in their general work of construction. Appellants admitted on the trial that they owed appellee something, but questioned the amount claimed.

There was evidence, however, from which the court, before whom the case was tried without a jury, was warranted in finding the indebtedness to amount to the sum named in the judgment. At the time appellee made a demand for money from James Welsh, one of appellants, he simply stated that he wanted some money, not mentioning any certain amount. A controversy arose between them, the exact purport of which does not plainly appear, and Welsh told appellee, if he would go to the camp, he would pay him. It does not appear however, that Welsh said he would pay him the full amount of the bill for which this suit was brought,

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nor that appellee at that time asked for the full amount claimed to be due him.

Appellants, while insisting that appellee should have presented his bill to them at their office or camp on the right of way, do not say that they would have paid him the amount claimed, and as they now contest the amount of the claim and insist that they did not owe appellee that much, it is to be presumed they would not have done so.

The facts shown do not present a case which made it necessary for appellee to present his claim to appellants at their office or camp on the right of way before commencing suit.

The judgment of the court below will be affirmed.

Affirmed.

City of Mt. Carmel v. Orra F. Havill.

1. ASSIGNMENTS OF ERROR—*how should be argued.* The arguments upon assignments of error should be made so specific that the court may determine precisely what is complained of.

Action on the case for personal injuries. Appeal from the Circuit Court of Wabash county; the Hon. PRINCE A. PEARCE, Judge, presiding. Heard in this court at the February term, 1906, Affirmed. Opinion filed September 14, 1906.

ROBERT BELL, E. B. GREEN and THEODORE G. RISLEY,
for appellant.

P. J. KOLB and M. H. MUNDY, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

At the time of the occurrence with which this suit is concerned, a firm of contractors was engaged under a contract with appellant, the city of Mt. Carmel, in excavating and paving a portion of Fourth street in said

city. The paving was to be in the center of the street, and thirty feet in width, there being an open space left on each side of the paved portion of the street. Fourth street runs east and west, is one of the principal streets of the city and much traveled. It is crossed at right angles by Main street. On the south side of Fourth street, at the corner of Main, was a building known as the Stansfield building, and at the rear of this building was an alley. As a part of their contract, the contractors were to construct a pavement in the alley from the property line across the walk on the south side of Fourth street and thence to the pavement in the middle of the street. The alley was 100 feet east of Main street, and some thirty feet east of the alley was located the Register printing office, where appellee had been employed for a number of years.

On August 29, 1905, the contractors were working on the street and alley and had excavated from the street into the alley. At the intersection of the sidewalk the walk was torn out, leaving an excavation the width of the alley eighteen to twenty-four inches deep, and across this excavation they placed two or three boards about six inches wide for the convenience of pedestrians. These boards were laid across the alley loosely and were shifted from time to time by the workmen. On the night of the day in question, only two boards were laid down for a walk. At the time this work was going on, a third story was being placed on the Stansfield building, and the space along it on the south side of the street between the sidewalk and the street paving was filled with material used on the building. While the workmen were at work on the Stansfield building, this sidewalk was closed by barriers, but at night and noon the walk was left open for general travel. There were notices posted up in that locality that the street was closed for travel, but the street was used all the time and it does not appear that appellee had actual knowledge of such

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notices. About 7:00 P. M. on the day named, which was cloudy and dark, appellee left his office and started towards Main street. As he neared the alley his foot struck a stake driven into the middle of the sidewalk and he was thrown violently forward into the excavation and was caught between the two loose boards and severely injured. The stake had been placed there by the contractors, it being their purpose to nail a rail to it to hold concrete they were using. It was driven firmly into and projected about four and one-half inches above the ground. The side facing appellee was some four inches wide. Appellee had knowledge of the general conditions existing at the place he was injured, but had no knowledge that the stake was there. It also appeared that a week or so before he was injured, appellee complained of the conditions to the mayor and told him there was danger of some one being hurt and a suit brought against the city. There was an electric light near the place where appellee fell, but it was not on at the time, and there were no danger signals placed there as a warning. Appellee brought suit against the city and obtained a verdict and judgment for \$500.

The city brings the case to this court for review, claiming that the verdict of the jury was contrary to the evidence and that the court admitted incompetent evidence and gave improper instructions to the jury.

By permitting the barriers to be removed, the sidewalk thrown open on the south side of the street in the evening and the planks to be placed across the excavation in the alley, the city, through the contractors, invited people to use that portion of the sidewalk. The stake driven in the walk was an obstacle which, in the dusk, became dangerous to one who did not know of or could not see it. The question whether the circumstances showed negligence on the part of the city and ordinary care on the part of appellee was one for the jury, and we are satisfied with their verdict on the facts in favor of appellee.

Counsel for appellant states generally, that there were errors "as to the admissibility of certain statements and evidence" of one of the witnesses for appellee, but he does not argue the matter nor indicate what constituted the alleged error. We have, however, examined the testimony of the witness named and find nothing objectionable in the ruling of the court in regard to the same.

Objection is made by appellant to the first two instructions given for appellee, which told the jury that appellant was bound to use reasonable care to keep its sidewalks in a reasonably safe condition for the use of persons passing over the same, for the reason, as alleged, that the sidewalks had been removed for the purpose of putting down a pavement across the alley intersection, and the only negligence which would be attributed to appellant in making the improvement was as to persons who had no actual knowledge of the dangerous condition of the crossing. This objection is not tenable, for the reason that it assumes that appellee had actual knowledge of the dangers which existed at the time he was injured, which was a controverted fact, and also because the city, when it removed the barriers and placed the planks across the alley, thereby invited people to walk along there, and gave persons having occasion to pass along that way the right to assume that the city had used reasonable care to render the walk reasonably safe. What is said in regard to the objection to these instructions, applies with equal force to a somewhat similar objection made to the third instruction given for appellant, which told the jury that if they found the sidewalk was defective, or dangerous, and that such condition was unavoidably necessary in making the improvements, then it was the duty of appellant to exercise reasonable care to warn the public against such defective or dangerous condition. We find nothing objectionable in this instruction as applied to the circumstances of

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the case. Other objections are made to instructions given for appellee, but as a series appellee's instructions appear to us to state the law with substantial accuracy.

The judgment of the court below will be affirmed.

Affirmed.

**Terminal Railroad Association of St. Louis v. Thomas
J. Condon, Administrator.**

1. **PECUNIARY LOSS**—*when sufficiently established in action for death caused by alleged wrongful act.* Where the next of kin are collateral, but are shown to have received financial benefit from the intestate, pecuniary loss is *prima facie* established, and the amount of the damages to be awarded is largely left to the discretion of the jury.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of St. Clair county; the Hon. CHARLES T. MOORE, Judge, presiding. Heard in this court at the February term, 1906. Affirmed. Opinion filed September 14, 1906.

J. M. HAMILL, for appellant.

J. H. McMURDA and KEEFE & SULLIVAN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit under the statute by appellee, as administrator of the estate of John Horrigan, deceased, for the benefit of the next of kin. The death of Horrigan is claimed to have been caused by the negligence of appellant's servants in the running and management of one of its trains over a public crossing in St. Clair county, which deceased was attempting to cross.

The declaration charged failure on the part of appellant to observe the statutory duty of ringing the bell or blowing the whistle, on approaching the cross-

ing; the running of the train at a greater rate of speed than that permitted by the city ordinances, and the omission of the common law duty to give warning or signal of the approach of the train, towards the crossing.

John Horrigan, as shown by the proofs, lived at Springfield; Illinois, and went to the World's Fair at St. Louis on November 26, 1904, in company with a friend named Watson. In the evening of that day, they crossed the river to East St. Louis and took a street car, on their way to Granite City, running in a northwesterly direction, to what is known as Black bridge, where the line on which they were riding terminated. About half a block from this point was another car line which deceased and his friend intended to take to carry them to their destination. Between the points where they left the car, which was on St. Clair avenue, and the line they proposed to take, there are six or eight railroad tracks, extending in a northerly and southerly direction, across and at right angles to St. Clair avenue. The first two tracks were operated by what was known as the Conlogue Railroad Company and the remainder by appellant. As they passed over the first two tracks and reached appellant's first track, they found a freight train upon it and quite a number of persons waiting for the train to move so that they could cross over. It was about eight o'clock in the evening and very dark. No light was provided at the crossing, and the darkness and confusion were added to by several engines at or near the crossing, emitting smoke and steam. The freight train was headed north, but when it moved it was backed south across the street. Immediately after the engine cleared the way, deceased and some others attempted to cross the track. Some of the persons cleared the second track and escaped injury, but as deceased reached the second track, he was struck by an engine, pulling a number of cars north across the

crossing, and killed. The engine pulling the cars was proceeding with the tender in front and its head attached to the cars it was pulling. There was no headlight on the tender and the headlight upon the engine was towards the south, next to a box car. The train was running at a speed estimated at twelve miles or more an hour, and no bell was rung or whistle sounded as the locomotive approached the crossing.

No evidence was introduced on the part of appellant at the trial, and the proofs clearly show that appellant was guilty of a high degree of negligence, and the deceased was at the time he was injured in the exercise of ordinary care for his own safety.

At the close of the testimony, appellant moved the court to peremptorily instruct the jury to find the defendant not guilty, and when this instruction was refused, counsel stated that appellant demurred to the evidence, and as soon as the evidence was written out, would file the demurrer, and asked that the jury be discharged from further consideration of the case. The court, however, refused to discharge the jury, and proceeded to cause damages to be assessed, counsel for appellant refusing to argue the cause. The jury returned a verdict for \$4,500, but appellee entered a *remittitur* for all in excess of \$1,000, and judgment was entered against appellant for that amount. Later counsel for appellant filed a demurrer to the evidence, which was overruled.

The right of plaintiff to recover in this case was clear, and the only practical question arising is that which concerns the amount of the judgment. It is contended by appellant that in no event could more than nominal damages be recovered in this suit, because deceased's next of kin were collateral kindred and were not in the habit of claiming or receiving assistance from him. The only person who testified upon that subject was James Horrigan, a brother of the deceased.

It appeared from his testimony that deceased, who

was a plumber and steam fitter and worked at his trade in Springfield, had a brother, the witness, and three sisters; that deceased was liberal to witness and helped him when he needed it; that deceased had given money to witness; that one of the sisters, Mrs. O'Connell, was quite an old woman and a widow; that she was too old to do anything much and received support, the extent not being shown, from her daughters; that deceased gave to her liberally; that he sent her money to live on and bought provisions for the house; that witness had seen her get the checks for money from deceased; that witness knew of him contributing to her about two months before his death; that he had sent her as much as \$50 at a time. His testimony upon this subject concerning the other sisters is not clear, and it is not certain that they received assistance from the deceased.

We are of opinion that it clearly appears from the evidence that the sister, Mrs. O'Connell, if not the other next of kin mentioned, was accustomed to receive support and assistance to a considerable extent from deceased, and that she has suffered a pecuniary loss in his death. The amount of that loss was difficult of determination and must necessarily be largely left to the discretion of the jury.

In *C. & A. R. R. Co. v. Shannon*, 43 Ill. 336, it is said: "If the next of kin have been dependent on the deceased for support in whole or in part, it is immaterial how remote the relationship may be. There has been a pecuniary loss for which compensation under the statute must be given * * *. How this pecuniary damage is to be measured—in other words what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury * * *. What the life of one person is worth, in a pecuniary sense, to another, is a question incapable from its nature, of exact determination."

The doctrine laid down by this case has been firmly

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established in this state. As appellee was entitled to recover more than nominal damages, and as it is impossible to determine the exact amount of the pecuniary loss, we are content to leave the amount as fixed in the judgment by the trial court.

The judgment of the court below will be affirmed

Affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1906.

Leo S. Marks v. Louis Greenberg et al.

Gen. No. 12,756.

1. **DISMISSAL**—*when proper for want of prosecution.* Dismissal upon a general call for failure diligently to prosecute the cause, is proper where ample opportunity to show cause why such dismissal should not be made is afforded and not availed of.

Bill in chancery. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

BENJAMIN J. SAMUELS, for appellant; ISRAEL SHRIMSKI, of counsel.

S. LAING WILLIAMS, for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant filed a bill in chancery against Louis Greenberg and Edward E. Wilson and wife, the appellees, July 29, 1902. A temporary injunction was issued against appellees the same date. After the issuing of the injunction no further proceedings were had in the cause until September 2, 1902, when the ap-

pellees entered their appearance. September 19, 1902, appellees filed a general demurrer to the bill. The transcript, which is certified to be a complete transcript of the record, shows that no further proceedings were had in the cause until March 30, 1905, when the court entered the following order:

“Ordered: That all chancery cases commenced previous to July 1, 1904, and now pending in the Superior Court to be put at issue before May 1, 1905, and in default of the same being done, such cases shall be dismissed for want of prosecution and for want of compliance with the order, at a general call to be commenced May 10, 1905, and continued from day to day thereafter by Judge Kavanagh unless good cause be shown by affidavit at the time of such call why this order was not complied with. And it is further ordered that in such general call all cases shall be dismissed in which no proceedings of record have been taken since July 1, 1904, and prior to the entry of this order, unless like good cause to the contrary shall be shown by affidavit. It is further ordered that a calendar of all cases to be then called, be prepared by the clerk of this court, and that all cases upon such call wherein cause shall not be shown at the time of such call, shall be dismissed in accordance with the foregoing order. It is also ordered that the time to reinstate cases dismissed in accordance with the foregoing order be and the same is hereby limited to and including June 30, 1905.”

Notice of the entry of this order was published, from time to time, in the Chicago Daily Law Bulletin, a daily paper wherein all notices and orders of the Superior Court of Cook County are published for the information of the Cook County bar. The cause was continued on the general call May 20, 1905, until May 23, 1905, in order for appellant to show cause why the cause should not be dismissed in accordance with the rule, which appellant failed and refused to do, and made the following motions, each of which was overruled by the court: Motion to take up and hear the de-

murrer to the bill; motion to set the cause for trial; motion to retain cause on docket, on the ground that the order of March 30, 1905, was improperly entered; motion to place the demurrer on the contested motion calendar for hearing. The court, after overruling appellant's said motions, dismissed the bill on motion of appellees.

The appeal, as appears by the condition of the appeal bond, is from the order dismissing the bill, and also purports by said condition to be from an order denying a motion to reinstate the cause; but no motion to reinstate the cause, or any order denying such motion, is contained in the record. The sole question, therefore, is whether the bill was properly dismissed. We think the order of March 30, 1905, a valid order. A similar order was before us in *Hopper v. Mather*, 104 Ill. App. 309, and was held valid. The order expressly provides, "And it is further ordered that, in such general call, all cases shall be dismissed in which no proceedings of record have been taken since July 1, 1904, and prior to the entry of this order, unless like good cause to the contrary shall be shown by affidavit." In this cause the last proceeding of record, prior to the entry of the order of March 30, 1905, was the filing of a demurrer to the bill September 19, 1903. It appears that appellant had ample opportunity to show cause, if any there was, why the bill should not be dismissed, and this he failed and refused to do. Having so failed and refused, the court committed no error in overruling appellant's motions above mentioned.

The decree will be affirmed.

Affirmed.

Joseph F. Enk v. John J. McCaffrey et al.

Gen. No. 12,769.

1. **DISMISSAL**—*when improper upon dissolution of injunction.* Upon dissolving an injunction granted in a cause in which other relief, than by injunction, is sought, it is error for the court, upon its own motion, to dismiss the bill.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed October 8, 1906.

Statement by the Court. This is an appeal from a decree of the Circuit Court dismissing a bill filed by appellant against appellees, at appellant's costs. The bill was filed August 18, 1905, and alleges, in substance, as follows: The appellee, A. D. Lutz, was, March 31, 1905, the owner of property known as 1794 Thirty-sixth street, in the city of Chicago, with the appurtenances, and, at said date, executed to complainant a written lease of the same, to run from said date till April 30, 1906, and put complainant in possession of said premises, and complainant is now in possession of the same, and peaceably and without disturbance occupied the same until August 4, 1905. There is situated on said premises a frame house used by complainant as a dwelling, and a barn in the rear of said house is also used by complainant, and there is some vacant property in connection with said premises which complainant has used and tilled for garden purposes, and until August 4, 1905, had growing thereon various vegetables and garden stuff. August 4, 1905, defendants entered on said premises and are destroying the same and have threatened to tear down the barn and other property in connection with the said described premises, to the irreparable injury of complainant.

It is provided in said written lease that complainant is to have peaceable possession of the demised premises for one year unless said Lutz should sell the same, and in case of sale complainant to have 60 days' notice, in writing, before being required to vacate and surrender any part of said premises. August 8, 1905, said Lutz served notice on complainant that he had sold the premises to defendant A. J. Schoenecke, who intended to take immediate possession thereof, and complainant has been informed and believes, and states the fact to be, that said Schoenecke has contracted with John McCaffrey, Edward S. Snyder and F. Carney, defendants, to excavate the premises for building purposes, which, if permitted, will commit irreparable injury to complainant.

The prayer is for general relief, for process and for an injunction restraining all of the above named defendants from interfering with the complainant in the peaceable possession of the premises known as 1794 Thirty-sixth street, and the appurtenances thereunto belonging, and from excavating or destroying any property on said premises, or removing any property from the same. The written lease is an exhibit to the bill and describes the demised premises thus: "The premises in the city of Chicago known and described as follows: the two-story frame residence and appurtenances thereunto belonging, known as No. 1794 36th street, in the city of Chicago, aforesaid, to be occupied for dwelling and for no other purpose whatever." The bill is verified by complainant's affidavit, and on his affidavit that his rights would be unduly prejudiced if an injunction should not issue immediately, without notice; and on the master's recommendation an injunction was ordered and issued as prayed, without notice. August 23, 1905, the defendants filed their appearance, and August 31, 1905, complainant, by leave of the court, filed an amendment of his bill, in which it is alleged in

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substance as follows: The premises described in said lease as "the two-story frame residence and appurtenances thereunto belonging known as No. 1794 36th street, in the city of Chicago," consist of two lots, each about 25 feet wide, which are known as lots 71 and 72, in Weston's subdivision of block 1 of J. H. Rees' addition to Brighton, being a subdivision in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 31, T. 39, N. R. 14 E. of the 3rd principal meridian, in Chicago, Cook County, Illinois. The lots are adjacent and enclosed in a common fence, and the building occupied by complainant is situated on the easternmost lot. The barn is on the rear part of both lots, and within the same enclosure, and the lots and improvements constitute one messuage. The residence building is marked 1794. In numbering buildings in Chicago a number is given for each 20 feet of street frontage, and the western lot, if a building were placed thereon and numbered, would be 1796 or 1798. Where property is improved by a building, the street number of the building is frequently used, and was in this case used to designate the entire messuage on which the building is situated. "That by the mutual mistake and error of said A. D. Lutz and his agent, one P. A. Hines, and said Joseph F. Enk, the premises demised by said lease, which premises were said entire messuage, residence building and appurtenances, were therein incorrectly, inaccurately and erroneously described as No. 1794 36th street, when the same should have been described, and are correctly described, as said lots 71 and 72, hereinbefore described, together with the residence building and barn and improvements thereon, and thereunto appertaining. That the property actually leased by said lessor and surrendered by him to said lessee, and the property actually received and taken possession of by said lessee under said lease at or about the time of the date thereof, that is, on or about April 1, 1905, and the property actually demised

by said lessor to said lessee and intended to be described in said lease was and is said messuage fifty feet in width fronting on said West 36th street in said city and known on the public records of said county as said lots 71 and 72, together with said residence, and barn, and appurtenances, which messuage the said lessee, with the full consent and knowledge of the said lessor, held full, complete, open and notorious possession of from about the time of making said lease until the forcible entry thereon by said defendants on or about the 4th day of August, 1905."

It does not appear from the public records of Cook County that said premises have been sold since June 14, 1897, and complainant charges, on information and belief, that no sale thereof has been made since said date; but said defendants fraudulently pretend and give out that there was a sale to defendant Schoenecke. August 4, 1905, said defendants forcibly entered on said westernmost lot and commenced to and did dig and excavate trenches, as if for the foundation of a building, and, after so entering, and about August 8, 1905, served on complainant the following notice:

"Chicago, August 2, 1905.

Mr. Joseph F. Enk,
1794 W. 36th St., Chicago.

Dear Sir:—

I regret to notify you that I have this day sold to August J. Schoenecke the premises now occupied by you at the above number. It is the intention of the purchaser to take immediate possession, and therefore I am obliged to give you notice in accordance with the terms of the lease, that the lease is cancelled from this date, and possession is asked in sixty days from this date, or as soon as possible for you to vacate.

Regretting the necessity of this action, I am,

Yours very truly,

D. LUTZ,

By J. H. Waters, Agent.

I hereby concur in the above notice.

AUGUST J. SCHOENECKE."

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Rent has been paid by complainant and accepted by said Lutz for said messuage, and the parties to said lease, by their acts, construed the same to mean that said entire messuage was demised by said lease. The original bill is further amended by adding to the prayer for general relief the following: "And that said lease may be reformed and corrected, and made to read in accordance with the true intent of the parties thereto, as this court may find the same to be, and so that the property therein described shall be one messuage, consisting of said lots seventy-one and seventy-two aforesaid, and the residence and barn thereon and improvements appurtenant thereto." The amendment is verified by the affidavit of complainant's solicitor, who swears as of his own knowledge. The defendants did not answer, but August 31, 1905, when the complainant filed his amendments to the bill, they moved the court to dissolve the injunction, on the ground that the bill showed no equity. The court ordered as follows:

"On motion it is ordered that leave be and the same is hereby granted said complainant to file an amended bill herein instantler, and it is further ordered that the motion made herein by said complainant to vacate the order heretofore entered herein, modifying the injunction heretofore granted herein, be and the same is hereby denied. And on motion of defendants it is ordered that said injunction be and same is hereby dissolved and the bill in this cause dismissed for want of equity at complainant's costs."

F. J. KARASEK, for appellant; I. T. GREENACRE, of counsel.

EDWARD R. LITZINGER and GOLDSMITH & MORRIS, for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The motion to dissolve the temporary injunction

must be considered as applying to the bill as amended, and two questions are presented for decision: First, whether the court erred in dissolving the injunction; and, second, whether it was error to dismiss the bill.

From the amended bill it appears that the demised premises were described in the lease as "the two-story frame residence and appurtenances thereunto belonging, known as No. 1794 36th street, in the city of Chicago, aforesaid, to be occupied for dwelling and for no other purpose." It also appears that the legal description of the lot on which the demised building is situated is lot 72 in Weston's subdivision of block 1, etc., and that the lot next west of lot 72 is lot 71, in the same subdivision, which latter lot complainant claims to have been demised as part of what he calls the message. While it may be plausibly claimed that the demise of the dwelling house on lot 72 includes that lot, we cannot understand how it can be reasonably contended that it includes lot 71. Lot 71 is not described in the lease in terms, nor is it included in the description given. It could not pass as an appurtenance of lot 72, because "one piece of land held in fee, or by a lesser title, cannot be appurtenant to another piece of land." *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410, 418. The lease expressly provides that the demised premises, number 1794 36th street, shall be used solely for a dwelling. We do not regard the allegations that lots 71 and 72 were enclosed by a fence and that lot 71 was vacant, and that complainant cultivated vegetables on it, as of any significance as affecting complainant's rights. If he could claim lot 71 because vacant and enclosed with lot 72, on the same principle he might claim his lease included all lots in the subdivision, if they were all enclosed by a single fence, and except lot 72, vacant. He had no legal right under the terms of the lease, including the description of the demised premises, to cultivate vegetables on lot 71, and it is not averred that the defendant Lutz, even knew of this. No entry has been made or threatened by any of the defendants on lot 72.

Considering the entire bill as amended, we are of

opinion that the court did not err in dissolving the temporary injunction, which was granted on the original bill. But the bill, as amended, is not solely for an injunction. It is a bill to reform the lease, so that the description of the demised premises therein shall be as it is averred the parties intended. It is averred in apt words that the parties to the lease made a mutual mistake in describing the premises intended to be demised and what their intention was, namely, to include lot 71 in the description, and reformation is prayed in accordance with the alleged intention. On proof of these allegations, which appear in the statement preceding this opinion, there can be no question of the power of the court to reform the lease as prayed. As said in *Kelly v. Galbraith*, 186 Ill. 593, 606, "That a court of equity has jurisdiction to reform a written instrument upon the ground of mistake is too well settled to need discussion." The bill not being solely for an injunction, but also for reformation of the lease, it was error to dismiss the bill on dissolving the injunction. *Hummert v. Schwab*, 54 Ill. 142; *Brockway v. Rowley*, 66 ib. 99; *Gillett v. Booth*, 6 Ill. App. 423; *Martin v. Jamison*, 39 ib. 248, 256.

In *Gibbs v. Davis*, 168 Ill. 205, the court say: "The rule is, where a bill contains a prayer for special relief and also a prayer for general relief, the complainant may be denied a decree for the relief specially prayed for, and, under the general prayer, be granted such relief as he may be found entitled to have, under the allegations of fact made in the bill and the proof in support thereof." *Ib.* 211. In this case there is in the amended bill not only a prayer for general relief, but a special prayer for reformation in accordance with the averments of the bill.

The court appears to have dismissed the bill of its own motion, as the record before us shows that the motion of the defendants was merely to dissolve the injunction, which motion operated only as an oral demurrer to the amended bill.

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The decree, in so far as it dismisses the bill, will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

City of Chicago v. Harold O'Brien, by next friend.

Gen. No. 12,776.

1. PEREMPTORY INSTRUCTION—*what question raised by motion for.* A motion for a peremptory instruction raises the question as to whether there is any evidence which proves, or tends to prove, the issues, and each of them, which it is essential for the plaintiff to establish in order to recover.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the October term, 1905. Reversed. Opinion filed October 8, 1906.

JOHN F. SMULSKI, for appellant; EDWARD C. FITCH and EDWARD S. DAY, of counsel.

CHARLES L. MAHONY, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellee was plaintiff and appellant defendant in the trial court, and appellee recovered judgment for the sum of \$2,000 and costs, from which judgment this appeal is taken. The suit was commenced October 11, 1900, and November 14, 1900, appellee filed an amended declaration, averring as follows:

"The defendant before and on, to-wit, the 8th day of November, 1899, was possessed of and had control of a certain sidewalk on a certain public street called Wendell street, in said city and county aforesaid, and ought to have kept the same in good and safe repair and condition; yet defendant, not regarding its duty

in that behalf, and while it so had the control of said sidewalk on the south side of Wendell street, at a point twenty-five feet westerly of a certain other public highway called Franklin street, in the said city of Chicago, the said city having had reasonable time and opportunity, after having received knowledge of such unsafe condition, to have put the same in proper condition for use before and on the day aforesaid, there wrongfully and negligently and without reasonable diligence, suffered and permitted two iron doors to be laid in said sidewalk for the purpose of permitting the occupant of the premises adjoining the said sidewalk at the point aforesaid, to have ingress and egress to and from the basement of said premises, through a hole or excavation under the sidewalk, and suffered and permitted the said iron doors to be and remain open, leaving a large hole or excavation in said sidewalk, with no guards or barriers, so that persons lawfully using the said sidewalk might be reasonably safe from danger by reason of the said hole or excavation in said iron doors. By means whereof the plaintiff, who was then passing there, through, along and upon the said sidewalk, while in the exercise of all due care for his own safety, necessarily and unavoidably fell into the said hole or excavation in said sidewalk, and was thereby thrown and fell through the said hole in said sidewalk to and upon the ground there; and thereby the left elbow of the plaintiff was fractured and dislocated," etc.

Appellee's mother, Mrs. Anna Spahn, formerly Mrs. O'Brien, testified that October 10, 1904, appellee was eleven years of age, so that his age November 8, 1899, when the accident occurred, was about five years and one month.

The following description by appellant's counsel, of the premises where the accident occurred, is correct and admitted so to be by appellee's counsel:

"On the southwest corner of the intersection of Franklin and Wendell streets, at the time of the alleged injury, was a brick building used as a bakery and store, fronting on the west side of Franklin street,

the north side extending westward on the south side of Wendell street. The front consisted of a door with a show window on either side; and on the Wendell street side a show window about six feet wide met the north front window. Along the front of the store was a little iron platform or elevation with glass agates in it, six or seven inches high, and it extends also along Wendell street the width of the window. Right at the end of this elevation was an opening in the sidewalk leading to a space beneath, which formed an entrance to the basement of the building. This opening extended westward from the elevation about four and a half feet, and was about four feet wide. It was covered by two iron doors of about equal width. When opened, one door lay up against the wall of the building and the other lay flat on the sidewalk. When closed, these doors form part of the sidewalk. The width of the sidewalk is not stated, except that it was 'a wide sidewalk.' There was no railing or guard about these doors. The distance from the sidewalk to the floor of the basement was nine feet, and a ladder led from the west end of the opening to the floor. Farther back, toward the alley, was an opening or area way."

There was another opening in the walk, into which coal was unloaded. The accident occurred about six o'clock in the evening of November 8, 1899, and the evidence tends to prove that it was dark or dusky at the time. Appellee and his sister, Kathleen, aged about eight years, had been playing around the described premises, when Kathleen started to her home, which was on the east side of Franklin street, three doors south of Wendell street. Appellee refused to go with her. Shortly thereafter she was returning to get him. He was standing on the elevation of the walk, at the west end of the Wendell street window looking at some cakes displayed in the window, and saw through the window that his sister was coming, and stepped back and fell into the opening, and down to the cement floor of the vault, and was injured. There is

no evidence that the opening was improperly or unsafely constructed, or that the doors or lids of it, which when down formed part of the sidewalk, were unsafe or insufficient. That the opening to the basement was constructed by the permission of the city is not questioned. There is nothing in the evidence to show, nor is it claimed, that the opening, when its doors or lids were down, rendered the sidewalk the least unsafe. Neither is it claimed that it was the duty of the city to cause a permanent railing or guard to be placed around the opening. The city was legally powerless to do so. The sidewalk is as much a part of the street as the roadway, and the doors of the opening, when closed, are a part of the street, and the effect of placing a permanent railing around the opening would be to deprive the public of the use of the enclosed part of the walk. While the city has ample power to prevent such an opening in the walk, the power is subject to the limitation that "the paramount right of the public to the full, free and safe use of the street, in all of its parts, shall not be infringed." *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 214. The defect for which it is sought to hold the city liable, is the permitting the doors of the opening to remain open, and the opening unguarded, and it was incumbent on appellee to prove either that the city had actual notice or knowledge of this defect, or that it had existed for so long a time, next before the accident, that the city, in the exercise of ordinary care, would have known of it, and, therefore, must be presumed to have known of it. *City of Chicago v. McCarthy*, 75 Ill. 602. There is no evidence that the city had actual notice that the doors of the opening were left open on the day of the accident, or at any time, or as to how long they had been open next before the accident. Kathleen, appellee's sister, who saw appellee about the time he fell into the opening, testified that she did not notice that the doors were open before she saw appellee fall into

it; that she didn't observe the doors open that day, before that time. Appellee testified nothing as to how long the doors had been open before the accident, nor did any other witness. The appellee relies exclusively on testimony that on other days prior to the day of the accident the doors had been open, as sufficient to charge the city with knowledge, which testimony we will now refer to.

Kathleen O'Brien, who was eight years old at the time of the accident, testified that prior to November 8, 1899, she noticed the doors open three or four times a week; that during the school months the doors were open when she returned from school, which was about 3:30 or 3:45 p. m., and that they would remain open till about 5 or 5:30 p. m. On her cross-examination the court asked her, "When you were at home, were you always where you could see that door?" to which she answered, "Mostly all of the time, when we would be at the step. We lived on Franklin street and could see it, if something was delivered there." The last part of the answer is explained by the evidence for appellant that sugar and flour were delivered at the opening, for the use of a bakery which was in the basement.

Lulu Moore, who was about ten years of age at the time of the accident, testified that she went to the same school as Kathleen O'Brien, and that, while coming home from school, about 3:30 p. m., in the summer months, they would see the doors open, and that sometimes they would be open till dusk; at other times not so long, and that during the months of September and October, 1899, she saw them open three or four times a week.

The foregoing is substantially all the evidence relied on by appellee in support of the averment that the city had notice that November 8, 1899, the doors of the opening were open and the opening unguarded. We think this evidence insufficient to charge the city with notice that the doors were open and unguarded at the

time of the accident. The utmost that can be inferred from the evidence in favor of appellee is, that the city, if exercising ordinary diligence, would have known that at times prior to November 8, 1899, the doors of the opening were left open and unguarded, and, therefore, must be presumed to have so known. But this presumption can go no further, and cannot be the basis of the further presumption that November 8, 1899, the city knew that the doors were open and the opening unguarded. "The law is that a presumption cannot be based on a presumption." *Globe Acc't Ins. Co. v. Gerisch*, 163 Ill. 625.

Appellant's counsel, at the close of the evidence for the plaintiff and again at the close of all the evidence, moved the court to instruct the jury to find the defendant not guilty, and presented to the court with each motion an appropriate instruction. The court overruled the motions and refused the instructions. It is assigned as error that the court erred in overruling the motion made when all the evidence was in, and in refusing to give the instruction presented with the motion. There was no evidence tending to prove faulty construction of the opening in the walk, or in the doors to the opening, or the insufficiency of the doors when closed, as part of the walk, and, therefore, either actual knowledge of the city that the doors were open and the opening unguarded, at the time of the accident, or that they had been in that condition for such length of time next before the accident, that the city would be presumed to have had knowledge, was necessary to a recovery.

The motion made at the close of all the evidence operated as a demurrer to the evidence, and raised the question whether there was any evidence tending to prove such actual knowledge of the city, or on which to base the presumption of the city's knowledge. There was no such evidence, and the court erred in overruling the motion and refusing to give the in-

struction asked. In *Frazer v. Howe*, 106 Ill. 563, 573, the court say: "If there is no evidence before the jury on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative." This language has been approved in subsequent cases. In this case we hold that there is *no* evidence tending to prove an element essential to a recovery, the existence of which element it was incumbent on appellee to prove, and, therefore, it was the duty of the court to instruct the jury as requested by appellant.

Counsel for appellant discuss other questions in their argument; but in view of the conclusion above stated, we deem it unnecessary to consider them in this opinion.

Counsel for appellee cites *City of Chicago v. Babcock*, 143 Ill. 358, in support of his client's case. The facts in that case are not fully stated, doubtless because a full statement was unnecessary, in view of the ground on which the case was defended. The court say: "No claim is made that it was not negligent on the part of the city to permit the opening in the sidewalk, and to permit the trap-door to be left open; but it is urged that there was no right of recovery because appellee was not exercising ordinary care, and that it was, therefore, error for the trial court to refuse to instruct the jury to find the defendant not guilty." The court then proceeds to show that the evidence tended to prove that the appellee exercised ordinary care. We do not consider the case applicable, and besides, in *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 214, a much later case, the court say: "But the city of Chicago had ample power to authorize the construction of the vault in question under the sidewalk, and the coal hole in the walk, to connect with the vault thereunder, provided the paramount right of the pub-

City of Chicago v. Bork.

lic to the full, free and safe use of the street, in all of its parts, was not thereby infringed.”

We think appellee's remedy is not against the city. If anyone is liable, it would seem to be the owner or occupant of the premises, for the benefit of whom the opening in question was made.

The judgment will be reversed.

Reversed.

City of Chicago v. Samuel Bork.

Gen. No. 12,780.

1. **WITHDRAWAL OF JUROR**—*when motion for, properly denied.* A motion for leave to withdraw a juror for the purpose of enabling the moving party to obtain additional evidence is properly denied, where such moving party does not appear to have exercised diligence in seeking, prior to the trial, to obtain such evidence.

2. **VERDICT**—*when not excessive.* A verdict for \$6,000 is not excessive, where it appears that the plaintiff at the time of the accident was about forty-nine years of age, was a carpenter, worked ten hours per day and earned twenty-five cents per hour, was prior to the injury, healthy and capable of following his trade, and became after the accident largely incapable of following his usual vocation in consequence of injuries to his back, nerves and internal organs.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. HOMER ABBOTT, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

JOHN F. SMULSKI, for appellant; EDWARD C. FITCH and ALFRED T. JOHNSON, of counsel.

CHESTER A. GROVER, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The declaration in this case consists of two counts, in the first of which it is averred, in substance, as

follows: Marianna street, to wit, September 2, 1901, was a public street of the city of Chicago. Then follow averments of the duty of the city in the premises, and that the city disregarded its duty "in that the defendant wrongfully, negligently and carelessly, for a long space of time immediately prior to the date aforesaid, to wit, for the space of six months prior thereto, and on the date aforesaid, allowed and permitted a certain hole to be and remain in said highway or street at the place aforesaid, at or near or just south of and next to a catch basin or construction of brick similar to a catch basin with a trap-door, man-hole or opening in the top of said construction; and the said hole in the said street, which defendant, as aforesaid, allowed to be and remain in said street, as aforesaid, was of great depth, to wit, two feet, and of great width, to wit, the width of two feet, and of great length, to wit, of the length of two feet, and so as to be in the way of, and to obstruct the passage of and to endanger persons and the plaintiff passing, while in the exercise of due care for their and his own safety while passing along or driving upon the said street or highway, at the place aforesaid, of all of which dangerous and unsafe condition of said street or highway the defendant then and there, on the date aforesaid, and for a long time prior thereto had notice." Then follows a statement of the accident and appellee's injuries, etc.

The second count is similar to the first, except that it does not describe the hole mentioned in the first count or allude to it otherwise than by the words, "The wagon in which the plaintiff was then and there riding, then and there ran and was propelled into said hole."

The defendant pleaded the general issue, the jury found for the plaintiff and assessed his damages at the sum of \$6,000, and the court, after overruling motions for a new trial and in arrest of judgment, rendered judgment on the verdict.

The accident occurred in Marianna street, a short distance west of Western avenue. The latter street lies north and south and the former east and west, so that the streets cross each other at a right angle. Artesian avenue is a north and south street next west from Western avenue. Western avenue is paved. There are sidewalks on the north and south sides of Marianna street, on the same grade as Western avenue, and the roadway is an unpaved dirt road. The width of the roadway is variously estimated by the witnesses at from thirty to forty feet, and is about two feet lower than the grade of Western avenue, except that on its north side it has been raised to about the level of the sidewalk, by the occupant of the premises at the northwest corner of Marianna street and Western avenue, who has a grocery store there. This raised part is about the width of a grocery wagon. Its length does not appear from the evidence, but it is described as running from the grocery store to the barn. There also appears by the evidence to have been a little filling in of the street on its south side, for a short distance from Western avenue, by the occupant of premises on that side. There is a decline from Western avenue to Marianna street, the length of which is variously estimated by the witnesses at from ten to sixteen feet. There is also a decline from Artesian avenue into Marianna street. There is a catch basin in Marianna street a short distance from Western avenue.

The accident happened September 2, 1901, in the forenoon. One Christensen, the owner of a wagon and team of horses, was hired by appellee to haul some lumber to his house on Artesian avenue, between Marianna street and Diversey avenue, which latter street is an east and west street next north of Marianna street. The wagon box was about two feet six inches in depth. Some of the lumber was short, so that it could be loaded into the box of the wagon; other pieces were twelve to fourteen feet in length, and those were

loaded on top of the lumber and the wagon box, the front ends of the timber sticking out in front of the box so far as not to interfere with the horses, and the hind ends sticking out behind the box. Appellee, who helped to load the wagon, testified that when they got above the top of the wagon box he stuck sticks along the sides of the box, between the sides of the box and the lumber in it. There was a chain fastened around the wagon box and the load, and the load was also bound to the wagon with ropes. The height of the load above the bottom of the wagon box was about four feet six inches, and its weight a ton and a half. Christensen, the owner and driver of the wagon, drove north on Western avenue to Marianna street, and then turned into the latter street. When he turned into the street, he and the appellee were sitting on the lumber, Christensen facing toward the horses, and appellee on the left side of the load facing toward the south. The wagon tipped over toward the south a short distance west of Western avenue. The driver jumped and was not injured. Appellee also jumped, and some of the lumber fell on and injured him.

Counsel for appellant contend that the court erred in overruling appellant's motion to exclude certain evidence; that the verdict is contrary to the weight of the evidence; that there is a variance between the declaration and the proof; that the plaintiff did not exercise proper care; that the appellant is not liable for the condition of the street; that the damages are excessive, and that the court erred in overruling appellant's motions for a continuance and a new trial. In both counts it is averred that the plaintiff, on the date aforesaid, was driving and passing along and upon said street or highway, at or near the place aforesaid. The uncontradicted evidence is that one Christensen, the owner of the wagon, was driving the team hitched to it. At the close of all the evidence, and before the jury was instructed, appellant's counsel "moved the

court to instruct the jury to disregard any and all testimony as to persons other than the plaintiff driving the team in question, at the time of the alleged accident, on the ground that there is a variance between the declaration and such testimony," which motion the court overruled.

Counsel for appellee contends that the words drive or driving are not to be restricted so as to mean the control or guidance of the horses drawing a wagon or carriage, but may be used in a less strict sense, as in the phrase, "we took a drive", or "we were driving", and cites the definitions of lexicographers in support of this position; but the precise question here is, how is the word "driving" to be understood when used in a pleading, as in the declaration in this case, in reference to a wagon being drawn by horses. In a case like this it is material to know whether the team was driven by the plaintiff or another person, because if by the plaintiff, the question is presented whether he exercised proper care in driving, whereas, if another person was driving, the negligence of the driver could not be imputed to the plaintiff if he, himself, were without fault. *Chicago C'y Ry. Co. v. Wall*, 93 Ill. App. 411, and cases there cited. Besides, the pleading is to be taken more strongly as against the pleader.

However, waiving the question whether the motion was made in apt time, we cannot perceive that appellant was, in the least, prejudiced by the ruling.

Christensen was the first witness called by appellee, and he testified that he drove the wagon and that the plaintiff was riding with him on the load, and appellant's counsel made no objection. The case was, thereafter, tried on the theory that appellee was not the driver, and appellant's given instruction five is framed on that theory, as are several of its refused instructions. "When the facts proven are not within the allegations of the pleadings, neither party can complain if each procures instructions declaring the rules

of law applicable to the facts shown by the testimony, regardless of the issues made by the pleadings, and asks a verdict in accordance therewith." C. & A. R. R. Co. v. Harrington, 192 Ill. 9, 27. Objections are made to rulings of the court in the examination of certain of the medical witnesses. We find no reversible error in the rulings.

After the plaintiff's evidence in chief was closed, and after a witness had been called by appellant and testified, appellant moved the court for leave to withdraw a juror and continue the cause, and in support of its motion presented the joint affidavit of Robert S. Cook and Alfred T. Johnson, who deposed, in substance, that they were assistant city attorneys, and had full charge of the investigation and preparation of the cause for trial, and that March 30, 1905, when the cause was reached for trial, they were informed that a Doctor Hook attended the plaintiff, after the injury complained of, and believed from said information that Doctor Elisha I. Hook was the physician meant; but April 4, 1905, they were informed, for the first time, that Doctor Elisha I. Hook was in partnership with his brother, Doctor Merritt B. Hook, and that it was the latter who attended the plaintiff after the accident, and that Doctor Elisha I. Hook's knowledge was derived from consultations with his brother. Doctor M. B. Hook has been a resident of Colorado for two years last past. Affiants were misled and could not have known and did not know that Doctor M. B. Hook was plaintiff's attending physician. Affiants say they cannot safely proceed to trial, in the absence of Doctor M. B. Hook, who is a material witness for defendant. They have been informed and believe, and state the fact to be, that he, if called as a witness herein, would testify that he was called by plaintiff the next day after the accident, and that the ailments and disabilities which the plaintiff now claims to be suffering from were, on said 3rd day of Septem-

ber, 1901, found by said Doctor Merritt B. Hook to have been of long standing, and a chronic condition, and were not caused by the injuries complained of, and that said Doctor M. B. Hook continued to treat said plaintiff for some time after said accident, and that all of said matters which affiants expect to prove are true, to their best knowledge, information and belief, and that they know no other person than Doctor M. B. Hook by whom they can prove the same.

The declaration in this case was filed December 20, 1901. In it the injuries of plaintiff caused by the accident are thus averred: "The wagon in which he was then and there riding capsized or tipped over and the contents thereof, a load of wood and timbers, were thrown over against and upon the plaintiff, and then and there and by reason of his said fall, and by reason of the wagon and contents striking him as aforesaid, the plaintiff was greatly wounded, injured and hurt, and divers bones of his body were broken, and muscles, nerves and ligaments of his body torn, injured, crushed, strained, bruised and damaged; and by and in consequence of the negligence of the defendant, as aforesaid, the plaintiff's kidneys and internal organs were injured; and the plaintiff has suffered and will forever suffer from nervous and kidney disorders, and by and in consequence of the negligence as aforesaid, the plaintiff is unable and always will be unable to control the action of his urine, and his urine passes from his body without his knowledge, and he is unable to control the action of his bladder and the muscles of his body controlling the action of his urine. And by and in consequence of the negligence as aforesaid of the defendant, the plaintiff has suffered injury to his nerves which has caused paralysis of various parts, nerves and muscles of his body, and his limb and various organs of his body have become paralyzed and will forever so remain; and by and in consequence of the negligence of the defendant as aforesaid, the plaintiff

iff has sustained injury to his nervous system, and to his brain and other nervous parts of his body, and in consequence of said injury he has suffered and will forever suffer from nervous disorders and his mind and mental faculties have been impaired and will forever so remain."

This, very clearly, was ample notice to appellant that appellee claimed to have been very seriously injured. Doctor Elias I. Hook was the witness who was called by appellant, just before appellant moved to withdraw a juror, and he testified that he and his brother, Doctor M. B. Hook, had offices in Chicago in September, 1901, and also testified: "We were practicing together in Chicago on and after September 2, 1901, until 1903. Then my brother left the city."

The bill of exceptions recites that the cause came on to be tried March 30, 1905. Appellant's counsel, as we have seen, had ample notice December 2, 1901, that appellee claimed to have been seriously injured. If injured as claimed, he must have had medical or surgical attendance; the physician who attended him had an office in the city, yet it does not appear from their affidavit that they made any effort to find him before the trial. Their witness, Dr. E. I. Hook, whose testimony they refer to in support of their motion, testified that the time they called on him was the Friday next before they called him as a witness. Their statement as to what the absent physician would swear to, if present, is evidently based on information from Doctor Elisha I. Hook, which they attempted to draw from him when on the witness stand, but which the court properly excluded. Besides, if Doctor Merritt B. Hook were to swear as the affidavit says he would, we think, in view of other evidence, that no juror in the panel would believe him. They say: "Dr. Merritt B. Hook, if called as a witness herein, would testify that he was called by said plaintiff on the day following the date of the alleged accident; and that the ailments

and disabilities which the plaintiff now claims to be suffering from were, on said 3rd day of September, A. D. 1901, found by said Dr. Merritt B. Hook to have been of long standing, and a chronic condition, and that they did not proceed from and were not caused by the injuries complained of." This refers not merely to some of the ailments and disabilities claimed by appellee, but to all of them. The jurat to the affidavit is dated April 7, 1905, and presumably the motion was made that day, which, as the trial commenced March 30th, was the eighth day of the trial. The motion is analogous to a motion for a new trial, on the ground of newly discovered evidence, the rules of law applicable to which are familiar, and we think it was properly overruled, as not showing diligence, and for other reasons.

Counsel for appellant contend that appellant is not liable even though the condition of Marianna street was as claimed by appellee, and that the accident was caused as claimed by him, and say: "There is no evidence that the city of Chicago had opened the roadway of Marianna street between Western and Artesian avenues for public travel." This proposition, in view of the evidence that the city took possession of the street, and improved it, constructing sidewalks on it, and a catch basin in the roadway, and that the street, for ten or more years, has been used by the public as a public street of the city, is too preposterous to require discussion.

The evidence supports the finding of the jury that appellee exercised due care.

The evidence for appellee tends to prove that the wagon tipped by reason of a wheel going into a hole a foot or more in depth, not far from the catch basin, as averred in the declaration. We are precluded from setting aside the verdict of a jury, on the ground that it is against the weight of the evidence, unless it is clearly so, and it is obvious that were the

rule otherwise, the province of the jury might be invaded. The evidence is so conflicting that had the jury given full credence to some of appellant's witnesses, the verdict might have been for appellant. But the jury, who saw the witnesses and heard them testify, and whose province it was to consider the question of their credibility, found for appellee, and the court, who had equal opportunity with the jury to consider the evidence, overruled appellant's motion for a new trial. When evidence is irreconcilably conflicting, it is for the jury to decide which is the more credible. The evidence is conflicting as to the location of the catch basin and of the hole. It appears from the record that appellant's counsel produced a photograph purporting to show a catch basin, and exhibited it to some of the witnesses in examining them as to where the catch basin was. This photograph is not in the record; no proof of its correctness was made, nor even that it was a photograph of the catch basin which was in the street at the time of the accident, nor was it put in evidence. It is not questioned that the city put the catch basin in the street. Presumably the city keeps records of improvements, as is its duty, in which case it would seem that it should have no difficulty in proving in what part of the street the catch basin was.

The appellee testified that, at the time of the trial, in March, 1905, he was fifty-three years old, so that at the time of the accident he was about forty-nine years of age. He was a carpenter and worked ten hours per day, at twenty-five cents per hour. The evidence is that he was healthy and well prior to the accident, and capable of following his trade, and that after the accident, and after he could leave the hospital, he tried to resume his trade, and worked at it a little time, but finally had to give it up, because of his impaired physical condition caused by his injuries. Doctor Elfeldt testified that he attended appellee September 10 to 12,

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1901, and examined him and found bruises across his groin and the lower part of his back, and his urine dribbling, and that his nerves of sensation were paralyzed from the lung region down; that he pricked him with a needle and he gave no sign; that he treated him three or three and a half months, and during that time his urine constantly dribbled, and that after he was able to leave his bed his gait was shuffling, and he did not seem to have full control of his legs, and that, in witness' opinion, his condition is permanent.

Appellee testified that when he had so far recovered that he could get out of bed, he found that he had a rupture, and had to use a truss, and was sent by his physician to a hospital, where he was operated on for the rupture; that he continued to wear the truss, and that before the accident he was not ruptured. It does not appear that appellant's counsel asked permission to have him physically examined. We do not think the sum awarded as damages is such as to warrant a reversal.

We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

Pennsylvania Company v. George B. Purvis.

Gen. No. 12,790.

1. COLLISION—*what establishes prima facie case in action for injuries caused by.* Where a passenger upon a railroad train has shown that his injury was the result of a collision, a *prima facie* case is made.

2. NEGLIGENCE—*minor's acceptance of railroad pass does not exempt company from.* The acceptance by a minor of a railroad pass containing an exemption from liability for negligence, does not operate to relieve the company from liability for an injury resulting to such minor from the negligence of the company.

3. NEGLIGENCE—*railroad company cannot contract for exemp-*

tion from liability for. A railroad company cannot by contract exempt itself from liability for negligence.

4. CONTRACT—*exception to rule that minor must make restitution upon disaffirming.* The obligation of a minor to make restitution upon disaffirming a contract, exists only in cases where he has received money or property by reason of the contract, which he seeks to avoid; he is not required to make restitution of something which it is impossible to restore.

5. INSTRUCTIONS—*should not contain abstract propositions of law.* Instructions which contain merely abstract propositions of law are properly refused.

6. ASSIGNMENTS OF ERROR—*when should be specific that damages are excessive.* An assignment of error that the court erred in overruling the defendant's motion for a new trial, does not raise the question of the alleged excessiveness of the damages, where the written motion for a new trial complained that the damages were excessive and the court in consequence reduced the amount of such damages.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

G. C. NIEMEYER and H. M. PIERCE, for appellant;
GEORGE WILLARD, of counsel.

THEODORE G. CASE and JOHN T. MURRAY, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee was plaintiff and appellant defendant in the trial court and will be so referred to in this opinion.

Plaintiff claims to have been injured in a collision between two of the defendant's trains, near Sharon, in the state of Pennsylvania, while a passenger on one of said trains. The facts are substantially as follows: The plaintiff in December, 1902, was in the employ of the defendant, in the city of Chicago, as a clerk, and then requested leave of absence for ten days and for transportation, which was granted, and a pass from

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Chicago to Erie, Pennsylvania, and return, reading as follows, was given to him:

<p>“PENNSYLVANIA LINES. Employe’s West of Pitts- burgh Trip Pass. Conductor’s Check 1902. Pass Geo. B. Purvis, From Chicago, Illinois, To Erie, Pa. In accordance with ac- companying pass. Account, Void if detached. Issued by General Manager.</p>	<p>PENNSYLVANIA LINES. Employe’s West of Pitts- burgh Trip Pass 1902. Pass Geo. B. Purvis, From Erie, Pa., to Chi- cago, Ill. Over E. & P. R. R., P. F. W. Ry. via P’gh. Account Clerk. Issued 1902 and expires Dec. 31, 1902. Not good on New York and Chi- cago Limited Express. Countersigned, GEO. L. PECK, General Manager. B. McKEEN, Supt.</p>
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Good only upon conditions on back hereof and when countersigned by B. McKeen.”

NOT TRANSFERABLE.

The person accepting and using this pass, thereby assumes all risks of accident and damages to person or property.

If presented by any other than the individual named thereon, the conductor will take up the pass and collect fare.”

The plaintiff was returning to Chicago on defendant’s passenger train December 30, 1902, between Wheatland and Middlesex, Pennsylvania, when a collision occurred between the train in which he was riding and a freight train of the defendant. When the freight train which was on its way west, arrived at Wheatland, it was found that the train had broken in two, and it was backed toward West Middlesex, for the purpose of taking up the rear or detached por-

tion of the train, and while being so backed the collision occurred and the plaintiff was injured, and was taken to the hospital at Sharon, where he remained that evening and the next day.

The proof of the collision is ample, and it is not denied. "Where the passenger is injured by any accident arising from a collision or defective machinery, he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury. A *prima facie* case is thus made out, and the *onus* is cast upon the carrier to disprove negligence." 3 Thompson's Com. on Negligence, sec. 2758, and cases cited in note 147, p. 218. In this case no proof was offered to rebut the presumption of negligence arising from the fact of collision. Defendant's solicitor impliedly admits negligence, by contending that by the pass defendant was liable for gross negligence only, and that there was no gross negligence. The sole ground of defense, on the merits, advanced by defendant's counsel is, that the defendant is not liable because the plaintiff, in accepting the pass, assumed the risk. The general rule is, that the contract of an infant is voidable and may be avoided by him within a reasonable time after he becomes of age. 1 Parsons on Contracts, 6th ed., sec. 294. There are exceptions to this rule, but we know of no exception applicable to the present case, nor has the defendant's counsel stated any supported by authority. The utmost counsel venture to say in this respect is, that "the purpose in making the gift was to contribute to the minor's welfare and happiness, and where also there was no manifest danger to the minor in the acceptance and use of the gift." There was, however, the risk of danger and consequent injury, and this the pass implies. Necessaries furnished to a minor are an exception to the general rule above stated, but the pass was not a "necessary" within the meaning of the law. In *Tupper v. Caldwell*, 12 Metc. 559, the court say of

necessaries: "The wants to be supplied are, however, personal, either those for the body, as food, clothing, lodging and the like; or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers and qualifying the individual to engage in business when he shall arrive at the age of manhood." It certainly was not for plaintiff's benefit to impose on him risk of all danger which might occur, by reason of the negligence of the defendant's servants.

In *I. C. R. R. Co. v. Beebe*, 174 Ill. 10, the court, after referring to *I. C. R. R. Co. v. Read*, 37 Ill. 484, and *Toledo, W. & W. Ry. Co. v. Beggs*, 85 id. 80, as holding that a contract exempted the railroad company from liability from any degree of negligence other than gross negligence, say, on page 24: "A railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, even by contract, limit its liability for injuries to passengers to gross negligence alone. It is responsible for any degree of negligence which is sufficient to cause the injury, whether such negligence be called gross or ordinary. The requirement of such responsibility is demanded on grounds of public policy."

That a railroad company cannot, by contract, exempt itself from liability for negligence, is held in the following cases: *Goldey v. Penn. R'd. Co.*, 6 Casey, 242; *Same v. Henderson*, 1 P. F. Smith, 315; *Same v. Butler*, 57 Penn. St. 335; *Burnett v. Penn. R. Co.*, 176 Penn. St. 45; *G. C. & S. F. Ry. Co. v. McGown*, 65 Texas, 640; *Louisville, N. A. & C. Ry. Co. v. Taylor*, 126 Ind. 126; *Bryan v. Mo. Pac. Ry. Co.*, 32 Mo. App. 228; *Jacobus v. St. P. & C. Ry. Co.*, 20 Minn. 110; *R'd Co. v. Lockwood*, 17 Wal. 357.

In the cases, *supra*, cited from 65 Texas, 126 Ind., 32 Mo. App., and 20 Minn., there were free passes,

with stipulations against the liability of the railroads for negligence. With reference to the distinction between ordinary and gross negligence, which is attempted to be made by counsel for the defendant in this case, the court say, in *R'd Co. v. Lockwood*, *supra*, p. 382: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities."

In *Bryan v. Mo. Pac. Ry. Co.*, *supra*, the court, p. 239, say: "And it is well settled in this state, whatever may be the rulings elsewhere, that any negligence in such cases is gross negligence; or, to state it differently, there are no degrees of negligence in such cases, where the passenger is without fault, as in this case."

In *R'd. Co. v. Lockwood*, *supra*, the court, after an apparently exhaustive consideration of the cases on the subject, state their conclusions, among which are the following:

"First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

The abstract of the evidence is not as full as it should be, so that we have had to look to the record, and are of the opinion that the evidence would warrant a verdict finding gross negligence. Defendant's counsel, assuming that the contract was merely voidable, say that plaintiff did not avoid it, because he did not make restitution, as was incumbent on him. He was injured in the latter part of December, 1902, and brought suit January 30, 1903. This was a sufficient avoidance of the alleged contract. He could not very well restore the ride. We have examined the cases cited by defendant's counsel in support of the proposition that plaintiff should make restitution, and find none of them in point. The liability of an infant to make restitution, if he will disaffirm a contract, exists only in cases where he has received money or property, by reason of the contract which he seeks to avoid.

In Reynolds v. McCurry, 100 Ill. 356, cited by defendant's counsel, the court say: "The general rule is, that where the consideration of a conveyance has been expended, so that he is not in a condition to restore it, he may nevertheless avoid the conveyance." Ib. 361-2.

Counsel for defendant object to the plaintiff's 4th and 5th instructions and to the refusal of defendant's instructions 1, 5 and 6. The objection made to plaintiff's instruction 4 is, that it omits the element of negligence. The collision is admitted, not only in the evidence, but in defendant's 2nd and 6th refused instructions, and the fact of the collision is *prima facie* evidence of negligence. Plaintiff's in-

struction 5 is not discussed by counsel. It contains no error. Defendant's refused instruction 1 is an abstract proposition, difficult to understand, which, had it been given, would not have tended, in the least, to enlighten the jury in considering of their verdict; but, on the contrary, might have tended to confuse their minds, and it was properly refused. Defendant's refused instruction 5 is drafted on the theory that the defendant was not liable except for gross negligence, and its refused instruction 6 on the theory that plaintiff was bound by the assumption of risk clause of the pass, and that his being a minor when he accepted it was immaterial. The instructions were properly refused. The jury assessed the plaintiff's damages at the sum of \$5,000, which sum, on the hearing of the motion for a new trial, was reduced, by *remittitur*, to \$3,000, and counsel contend that even the latter sum is excessive, to which counsel for the plaintiff answer that this is not assigned as error. The only assignments of error are: "1. The honorable Superior Court erred in overruling said defendant's motion for a new trial. 2. The honorable Superior Court erred in not granting said defendant's motion for a new trial."

Counsel for defendant contend that the question whether the sum of \$3,000 is excessive is included in the assignment that the court erred in overruling the motion for a new trial. That motion and the reason or grounds for it are in writing, and the only ground at all relating to damages is in these words: "The damages awarded are excessive," which can only mean that the assessed sum of \$5,000 was excessive. The court seems to have been of this opinion, as it was on the suggestion of the court, and to prevent another trial, that the plaintiff remitted \$2,000 from the verdict. The court rendered judgment for the remainder, \$3,000. The objection, or ground for a new trial, that the sum of \$5,000 was excessive, was eliminated

from the motion by the reduction of the damages to \$3,000, and that ground is not before us for review, and there is no assignment of error which includes the objection that the sum of \$3,000 is excessive. The rule is, that every error relied on must be assigned and specifically pointed out in the assignment, and that an error not so assigned is not reviewable. *Berry v. City of Chicago*, 192 Ill. 154.

The defendant's motions to take the case from the jury and for a new trial, were properly overruled.

The judgment will be affirmed.

Affirmed.

City of Chicago v. Annie McNally.

Gen. No. 12,792.

1. **MEDICAL EXPERT**—*what testimony of, competent.* Where a medical expert has testified that he can tell objectively that certain conditions exist, such as tenderness, despondency, irritability and pain, he may be permitted to testify thereto.

2. **EXCEPTIONS**—*what does not supply absence of, in bill of exceptions.* The absence of exceptions in the bill of exceptions is not supplied by an understanding with the court shown in such bill of exception that adverse rulings were to be taken as excepted to without specification. The exceptions must, notwithstanding such arrangement, be noted in the bill of exceptions.

3. **REVERSAL**—*when error must be plain to require.* Where two juries have passed upon a case and have found the same way, an error to reverse must be clear and palpable.

4. **PHYSICAL EXAMINATION**—*question of right to show refusal of.* It is held in this case under its facts, that it was not error for the court to refuse to permit the defendant to show the plaintiff's refusal to submit to a physical examination by experts employed by the defendant; but the question is not determined as a general proposition of law.

5. **VERDICT**—*when not excessive.* A verdict for \$10,000 held not excessive where the plaintiff, a woman, was at the time of the accident about thirty years of age, was in good health and regularly employed in a commercial business and in consequence of the accident became incapacitated from continuing her usual em-

ployment, lost about thirty pounds in weight, and suffered injuries to her nervous system, etc.

6. NEWLY DISCOVERED EVIDENCE—*when not ground for new trial.* A motion for a new trial should not be granted, in order to afford opportunity for the production of newly discovered evidence upon a showing which is not positive as to the existence of the evidence, and which does not make it appear that diligence had been employed in seeking to obtain the same prior to the trial resulting in the verdict sought to be set aside.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

JOHN F. SMULSKI, for appellant; EDWARD C. FITCH and FRANK D. AYERS, of counsel.

WILLIAM E. RAFFERTY, for appellee; CHARLES J. TRAINOR, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$10,000 recovered by appellee against appellant, in an action for negligence, *per quod* it is averred the appellee was injured. The appellant pleaded the general issue to the declaration, and no question is raised as to the sufficiency of the pleadings. The evidence for the plaintiff (appellee here) tends to prove that April 7, 1901, between ten and eleven o'clock A. M., she and her sister-in-law were walking along the west sidewalk of Forty-second avenue, in the city of Chicago, which lies north and south, and came to a place in the sidewalk where a board was out, leaving a hole in the walk the dimensions of the absent board; that plaintiff was about to step over the hole, when her sister-in-law, who was walking west of her on the walk, stepped on the west end of a board of the walk, and the east end of it flew up and tripped the plaintiff, and she fell down and was injured.

The sidewalk was constructed by laying three stringers on the ground, running north and south, and laying planks about six inches wide across the stringers. The sidewalk was about six feet wide and the height of its surface from the ground was from eight to ten inches. The evidence, which is uncontradicted, tends to prove that the end of the most easterly stringer, which was nearest the roadway, had entirely rotted off from some distance back from the point where it originally connected with another stringer, and the most westerly stringer was partly rotten, and the middle stringer sound, so that if one stepped on the west end of a plank south of the hole, the east end of it would be likely to fly up.

It is shown by the evidence, and not contradicted by the defendant, that the sidewalk had been in bad condition for two months or longer, prior to the accident. The defendant offered no evidence in regard to the condition of the walk, and its counsel admit in their argument that it was in very bad condition and unsafe. The objections relied on, in argument, by defendant's counsel, for a reversal of the judgment, are, that the plaintiff did not exercise ordinary care; that the court admitted incompetent evidence and excluded competent evidence; that the damages are excessive; that the defendant had not a fair and impartial trial, and that the court erred in overruling defendant's motion for a new trial.

The question whether the plaintiff exercised ordinary care was submitted to the jury by instructions given by defendant's request, and we think the jury were warranted by the evidence in finding that she exercised ordinary care. The objection that incompetent evidence was admitted, relates mainly to the testimony of Doctors Marshall, Adams and Skelton, who testified as medical experts. Dr. Marshall, in testifying as to the plaintiff's condition on an occasion when he examined her, said "she seemed very de-

spondent," and that he so discerned objectively. The evidence was admitted over defendant's objection. The witness also testified that, in an examination of the plaintiff about a week before the trial, he found tenderness over the spine, just above the hips and in the region of the neck, and that she seemed to be very feeble and depressed and was quite irritable. Counsel for defendant moved the court to strike out the evidence as to tenderness, despondency and irritability, on the ground that these were subjective symptoms. The court overruled the motion. The witness had already testified that he could tell, objectively, whether there was a tenderness, and whether plaintiff seemed despondent, and we are not prepared to hold that it cannot be told, objectively, whether one is irritable. We find no reversible error in said rulings of the court.

Dr. Adams, who examined plaintiff several times, testified, among other things: "Her mental condition was fair. The emotional features were quite pronounced. She cried easily upon examination and without cause. That was in the course of the examination I ascertained that." Defendant's counsel moved to strike out the testimony in relation to "emotional features" as being a subjective symptom, which motion the court overruled. The witness saw that the plaintiff cried easily, and he saw no apparent cause for this, and we cannot perceive how the defendant could be prejudiced by the testimony of the witness that plaintiff cried easily and without cause. Dr. Adams testified that the plaintiff suffered pain, and this is objected to, as being a purely subjective symptom; but the doctor testified that the feeling pain, on pressure to discover tenderness, if any, is evidenced by the involuntary wincing of the pupils of the eye when the patient is hurt, which is an objective sign, and which he observed. Doctor Adams was asked: "What would be your judgment, Doctor, as to her ability to

perform manual labor?" to which question defendant's counsel objected, when the court said: "He may state what effect this diseased condition would have upon her muscular force or nervous energy, as to her ability to perform manual labor." The witness answered: "I think it would be hard for her to put forth a continued effort at a position requiring manual labor;" which answer defendant's counsel moved to strike out, and the motion was overruled. The evidence was competent as bearing on the question of damages. The same question was put to Doctor Skelton, who answered, in substance, that plaintiff had not the nerve power to work. Counsel, in their argument, object to the answer, but no exception is preserved. Doctor Adams testified, as the result of his examination of plaintiff, that "there was inability to write evenly and correctly with the right hand, as she had done previously," when defendant's counsel moved to strike out the words "as she had done previously," and the court ruled that if the witness knew of her writing prior to the accident, he might answer, and on the witness stating that he had seen envelopes and letters written prior to the accident, the court ruled that the evidence might stand, subject to be supplemented by proof that the letters, etc., seen by the witness were in plaintiff's handwriting. Subsequently, on plaintiff's attorney stating to the court that he could not produce such proof, the evidence of the witness as to plaintiff's ability to write was stricken out. There was no exception to the ruling of the court allowing the answer of the witness to stand on the condition mentioned, and we find no error in the ruling.

The following question was asked Doctor Marshall: "I will ask you whether or not the condition you found the patient in, in April, 1901, and found at the last examination, could have been caused by traumatism or a fall?" On objection made, the court said: "He may state what, in his opinion did cause it," which

question counsel for plaintiff adopted, and the witness answered: "In my opinion the condition that I found her in on April 7, 1901, must have been caused by some traumatism or injury." Q. "What do you mean by traumatism?" A. "Some injury." Q. "External violence?" A. "In this case, yes." It is objected that the admission of this evidence was erroneous, on the ground that the inquiry and answer involved the issue to be found by the jury. While we do not concur in this view, it is sufficient to say that no exception has been preserved to the ruling of the court. Counsel for defendant seek to avoid the want of exceptions in the record by reference to the following colloquy between the court and counsel:

Mr. Ayers, defendant's attorney: "Let me ask the court, when I raise an objection and the court rules upon it, is it necessary for me to take an exception in order to preserve my rights?"

The Court: "No, whenever you make an objection and the court rules against you, it will be understood that you are saving an exception."

This meant nothing more than that appellant's attorney, in order to preserve an exception to the court's ruling, would not be required to state, on the trial, that he excepted. It did not at all dispense with noting exceptions in the bill of exceptions, which appellant desired to preserve for review, and so we held in *N. K. Fairbank Co. v. Nicolai*, 112 Ill. App. 261 267. To avail of an exception, it must appear in the bill of exceptions. *C. R. I. & P. Ry. Co. v. Town of Calumet*, 151 Ill. 512.

In the course of the cross-examination of the plaintiff, the defendant's attorney commenced to ask her a question thus: "Would you be willing"—when the plaintiff's attorney objected. Both parties assumed that the question sought to be put was whether the plaintiff would be willing to submit to a medical examination. The court, after certain remarks by the court

and the attorneys, said: "I don't think the argument should be had in the presence of the jury;" when the attorney for the defendant said, "I don't care whether the jury is present or not." The court, the attorneys and the witness then went into the judge's chambers, when the following occurred:

The court: "I will let the record show that the question was asked in the presence of the jury, and the request was refused; also that the question was asked of plaintiff's counsel about a week or so ago, and that request was refused. Those questions may appear in the record as having been asked in the presence of the jury, and the requests for an examination were refused."

Mr. Ayers: "Let the record show that counsel for the defendant objects to the court ruling out the statement of counsel for the defendant that he, counsel for defendant, had submitted the names of several specialists to counsel for the plaintiff to examine the plaintiff some time previous to the trial, and that counsel for the plaintiff refused every one of them. The grounds upon which counsel urged the objection was because of the remarks of counsel in the presence of the jury; that counsel for the defendant should have made the request of counsel for the plaintiff out of the presence of the jury."

Mr. Rafferty: "I object to that going in."

Mr. Trainor: "That is not a part of the record here."

The Court: "It will be a part of the record, but it will not be anything that they can go before the jury on."

Mr. Ayers: "Oh, certainly not; my statement is there, and the court's statement, and my statement and my exception to the ruling will be shown."

The judge and the attorneys then returned to the court room, when the examination of the plaintiff proceeded as follows:

Mr. Ayers: "Miss McNally, are you willing to allow some specialist on nervous diseases, which you claim is your present physical ailment, to make a personal examination of you on behalf of the defendant, for the purpose of testifying?"

Mr. Rafferty: "I object."

(Objection sustained; exception by defendant.)

Mr. Ayers: "Are you willing to allow—"

Mr. Rafferty: "I think that has gone far enough, if the court please."

The Court: "Let him ask the question."

Mr. Ayers: "Are you willing to allow the court to select some specialist to make such an examination?"

Mr. Rafferty: "I object."

The Court: "The objection is sustained."

(Exception by defendant.)

Mr. Ayers: "Are you willing to allow any member of the jury to make such a selection?"

(Objection by plaintiff; sustained; exception by defendant.)

Mr. Ayers: "That is all."

We confess our inability to understand what the judge meant by saying, in chambers, that the record might show that the question whether plaintiff would submit to a medical examination was asked in the presence of the jury, and the request was refused. The record does not so show, but merely recites what the judge said, and shows affirmatively that the question was asked plaintiff, and was excluded on objection.

In *Parker v. Enslow*, 102 Ill. 272, and *P. D. & E. Ry. Co. v. Rice*, 144 ib. 227, the court held that the trial court had no power to compel a plaintiff, in such case as the present, to submit to a medical examination, from which ruling it necessarily follows that the plaintiff has the right to refuse to so submit. Counsel for the defendant say, in their argument: "She had the right to refuse to submit to an examination, but we think that the jury were entitled to know that she

did refuse, and that it was a fact which the jury might take into consideration, with the rest of the evidence." But defendant's attorney, in his argument to the jury, substantially told the jury that his client had been denied a medical examination of the plaintiff, saying: "The city of Chicago would like to know from some other doctor what her medical condition is. You, gentlemen of the jury, want to decide this case right. You want to do justice to her. You want to do justice to the people of the city of Chicago. You, I don't doubt, would like to have the advantages of the testimony of some reputable physician from the other side of the case, who had examined her and could tell you whether or not they agreed; whether they find the same things which these three doctors tell you they find. But you are denied the advantage of their testimony in making up your minds in this case, just as the city of Chicago, through its attorneys, is denied that."

On the plaintiff's attorney objecting to this statement, the court said: "Oh, I think he can go on." The question presented is a new one, and has not been passed on by the Supreme Court, and we are not inclined to hold that the refusal of the trial court to permit the plaintiff to be asked, in the presence of the jury, whether she was willing to submit to a medical examination, is reversible error, especially in view of the foregoing statement made to the jury by defendant's attorney, with the approval of the court. There have been two trials of the cause, in each of which the verdict was for the plaintiff, and in such case error should be plain and clearly prejudicial to warrant a reversal.

It is next urged that the damages are excessive. The plaintiff is a single woman. She was about thirty years old at the time of the accident, about five feet and eleven inches in height, and at the time of the accident weighed 190 pounds, which

the evidence shows was about normal weight for one of her height. Before the accident she was in good health, and had never been sick, or required the attendance of a physician. She had worked steadily for the Banner Waist Company, in Chicago, six or seven years, except during vacations given to the company's employees. Since the accident the weight of the evidence is that she has not been able to do any work, except light household work, and she has done no work for which she received wages. At the time of the trial she weighed 160 pounds. When the accident occurred plaintiff, with the assistance of two persons, walked a short distance on the sidewalk and there rested until a carriage was brought for her, in which she was carried to her brother's house, and assisted to bed, where she remained for six weeks, when, by the advice of her physician, she went to the home of her parents near Whitmore, Michigan. She describes her injuries thus: "While I was in bed I suffered severe pain across the small of my back and further up, between my shoulders, and in the back of my head and across my abdomen." "I had pains in my back continually since the injury, right across the small of my back, where this first pain pained me; also through my shoulders and at the back of my neck. There were times I got so nervous I could not control myself. I have to go and sit right down, any little excitement, and keep quiet. That will last maybe half an hour or an hour, and then I would have severe headaches. That states my condition with respect to nervousness. That manifests itself right in the back of my head, the pain in the back of my head more than in the front; and I get melancholy, sad and discouraged, and that is how I appear, and my body trembles." The testimony of Doctors Marshall, Adams and Skelton corroborates that of plaintiff as to her physical condition and her inability to work. Dr. Marshall, who was her attending physi-

cian from the date of the accident until the next June, and who examined her a week before he testified in the cause, said: "Judging from the time she had been ailing since the injury, and the means she had resorted to to improve her health, my judgment is that her condition, when I saw her last, is permanent. From what I saw, I believe that she could perform light manual labor, but my judgment is that she would be unable to continue for any length of time at anything that required close application to work." Dr. Adams examined plaintiff a year before the trial and again a short time before the trial. He testified: "I think she is not in as good condition to-day as when I examined her about a year ago. I think she has reached the limit of her improvement, and I do not believe she will ever get better." In reference to plaintiff's ability to work, Doctor Adams testified: "I think it would be hard for her to put forth a continued effort at a position requiring manual labor." Dr. Skelton's testimony as to the physical condition of the plaintiff, the permanency of her condition and her incapacity for work, is substantially the same as that of Doctors Adams and Marshall. Briefly stated, the case presented to the jury by the evidence was, that the plaintiff prior to the accident was a strong, healthy and cheerful woman, capable of earning her own living by active work, and who so earned it, and that by the accident, which resulted from the defendant's negligence, she became a permanent invalid. We cannot sustain the contention that the damages are excessive.

A motion for a new trial was made by defendant, one ground for which motion is newly discovered evidence. The alleged newly discovered evidence is set forth in the affidavits of seven persons. These affidavits are to the effect that the plaintiff was, in 1902, and has been since said time, in good health and able to work, and are, as we think, plainly cumulative

of the testimony of Dr. C. S. Lane and Edwin Beckwith, witnesses for the defendant. The affidavit relied on by defendant's counsel as showing diligence in respect to the alleged newly discovered evidence, is an amended affidavit of defendant's attorney, Mr. F. D. Ayers, which is as follows:

"F. D. Ayers, being first duly sworn, deposes and says, that the diligence referred to in affiant's former affidavit, filed herein on April 22nd, A. D. 1905, consisted of the following acts or efforts on the part of the defendant herein to secure the said newly discovered evidence before the time of the trial of the above cause; that on, to-wit, the 15th day of March, A. D. 1905, Mr. F. W. Altpeter, one of the assistants of the City Attorney's office of the city of Chicago, went to Whitmore Lake, Washtenaw County, Michigan, and went to the home of various and many persons living in the vicinity of Whitmore Lake and made inquiry in reference to the physical condition of Anna McNally, the plaintiff herein, of such persons, and also made inquiry as to what work or pleasure requiring physical exertion said Anna McNally had indulged in during the period of the spring of 1901 to the time of the trial of the above cause; that said F. W. Altpeter was unable to obtain the facts and circumstances set forth in the seven affidavits attached to and made a part of affiant's original affidavit, and that said information did not come to the knowledge of this affiant, or any one connected with the City Attorney's office, until after the trial of the above cause, as set forth in said original affidavit. Affiant states further that said newly discovered evidence is necessary in order to secure a fair and just trial in the above cause, and that this affiant is now ready to produce said witnesses at a subsequent trial of this cause, and affiant believes that said evidence is material and necessary for a proper trial and will change results of the suit."

This suit was commenced April 23, 1901, the first trial of it took place in February, 1903, and the last trial commenced March 22, 1905, and March 15, 1905,

defendant, as appears from Ayers' affidavit, first commenced to seek information in respect to plaintiff's health and physical condition, although the defendant must have known when the declaration was filed, June 30, 1901, and February, 1903, when the first trial was had, the injuries which plaintiff claimed to have suffered. In *Calhoun v. O'Neal*, 53 Ill. 354, 358, the court say: "Again, we fail to see there was not negligence on the part of appellant in obtaining this evidence on the last trial. There had already been one jury trial, and it is probable that the same defense was interposed in the first as on the last trial. If so, and the affidavits fail to state it was not, then appellant was fully apprised that he would have to meet it on the latter trial, and he should have searched for the evidence he has since discovered. But he fails to state that he made any effort to find it, or to give any excuse for failing to procure it. This evidence was as completely in his reach, for aught we can see, before as after the latter trial. We are not prepared, therefore, to hold that he is free from negligence."

See, also, *City of Chicago v. Hogan*, 80 Ill. App. 345, 348.

The affidavit is evidently hearsay, although not so in form. It is evidently based on information derived from Mr. Altpeter, whose affidavit was not produced, nor its non-production accounted for. All that is stated in regard to what Altpeter did is, that he made inquiries of various and many persons living in the vicinity of Whitmore Lake, and that he was unable to obtain the facts and circumstances set forth in the seven affidavits. Such general statements are insufficient to show diligence. The court could not tell from either the original or amended affidavit of Mr. Ayers of whom Altpeter made inquiry, or that he "was unable to obtain the facts and circumstances." In *C. & A. R. R. Co. v. Raidy*, 203 Ill. 310, 316, the court say: "Affiant states that he made inquiry of a number of

persons from whom he hoped to receive information as to the whereabouts of appellee, and was unable, although he made diligent efforts to do so, to ascertain his whereabouts. This is the mere conclusion of the affiant, and gave the court no information upon which it could determine whether he was diligent or not. Nor does the affidavit state that he had any reason to believe or suspect that appellee was not injured as much as he would claim upon the trial, and that he was seeking his whereabouts and endeavoring to collect evidence to show the real extent of his injury." This language, and other language in the case cited, is applicable here. See, also, Heldmaier v. Taman, 188 Ill. 283.

It would seem that had diligence been used in apt time, the evidence might have been procured in time for the trial. The defendant did procure it after the verdict, and it is extremely improbable that the seven affiants, all of whom live in Michigan and whose affidavits were procured there, volunteered the matter contained in their affidavits without solicitation by the defendant.

The motion for a new trial was properly overruled, and the judgment will be affirmed.

Affirmed.

David S. Dempster v. Killian V. R. Lansingh.

Gen. No. 12,863.

1. INJUNCTION—*when assessment of damages upon dissolution of, may be made.* The assessment of damages following the dissolution of an injunction improvidently granted, may be made during the pendency of the undecided basic suit.

2. INJUNCTION—*when partial dissolution justifies award of damages.* Dissolution of an injunction in a material part justifies the assessment of damages as an indemnity for the necessary expense of procuring that dissolution.

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3. INJUNCTION—*when damages by way of solicitor's fees awarded upon dissolution of.* Solicitor's fees which are necessarily incurred in procuring the dissolution of an injunction may be allowed as damages, but where an injunction is merely ancillary to the principal relief sought by the bill and its dissolution is only incidental to the defense made and the fees are incurred in defending the suit generally or in the management of some other branch of the case, they cannot be assessed as damages.

4. INJUNCTION—*when services rendered in connection with motion to dissolve.* The fact that a motion to dissolve an injunction includes an application for the discharge of a receiver appointed by the court as ancillary to the injunction awarded, does not make the services other than necessarily rendered in obtaining the dissolution of the injunction.

5. INJUNCTION—*when damage cannot be urged as not having resulted from.* An injunction which accomplishes the purpose for which it was designed cannot be said to be nugatory and not to have resulted in damage merely because it was inartificial in some respect.

6. INJUNCTION—*what does not affect right to allow solicitor's fees upon dissolution of.* The fact that the solicitors employed to obtain a dissolution of the injunction have a financial interest in the subject-matter affected by the injunction, does not affect the right of the court to allow fees upon dissolution as in other cases.

7. INJUNCTION—*what does not affect right to allow solicitor's fees upon dissolution of.* The fact that the services necessary and performed in securing a dissolution of a preliminary injunction, would be also necessary in a hearing on the merits of the case, will not prevent an allowance for the payment of such services as damages on the dissolution.

8. INJUNCTION—*what damages cannot be awarded upon dissolution of.* Exemplary damages cannot be awarded upon the dissolution of an injunction.

Bill for injunction, etc. Appeal from the Circuit Court of Cook county; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed October 8, 1906.

CANNON & POAGE and JOHN B. HEINEMANN, for appellant.

ROBERT F. PETTIBONE, HENRY W. WOLSELEY and WILLIAM S. FREEMAN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This appeal—a mere ramification or appendage to litigation which has claimed much time and attention from the courts of this county and state since 1882—comes to us in a record of over 5,000 typewritten pages. The printed abstract contains over 800 pages of reading matter and the briefs and arguments over 200. The extent of this matter to be examined sufficiently excuses the delay which has postponed the decision of the case beyond that of those near it in numerical order. Fortunately the disposition of the issues involved does not necessitate a proportionately extended discussion.

The appeal is from a decree entered by a chancellor in the Circuit Court of Cook county, on November 5, 1904, on a suggestion of damages filed in that court September 26, 1903, by leave of court given by another chancellor on September 18, 1903, in an interlocutory order dissolving a temporary or preliminary injunction granted by him April 7, 1902, in a suit in chancery, which at the time this appeal at bar was taken was not at issue. Said suit was entitled David S. Dempster v. Killian V. R. Lansingh et al. It was begun April 7, 1902, by the filing by David S. Dempster of a bill against Lansingh individually and as executor of one John Dempster and against several other defendants. The bill recited the history of a former litigation concerning the ownership of stock in the Rosehill Cemetery Company, and alleged that Lansingh had occupied the position of a trustee for the benefit of the complainant and the various persons made additional defendants to the bill, and of others not so made parties, in managing and controlling the stock and the rights thereto in a controversy with creditors of the corporation; that in that capacity, after negotiations failed, he carried on a litigation with said creditors which lasted fourteen years, and

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was concluded on August 4, 1896; that while acting as such trustee said Lansingh had acquired certain stock in said corporation and received certain dividends thereon, which stock and dividends he pretended to have received in his individual right, but which in law he took as trustee with the duty of accounting for them to the complainant and others similarly situated, but that although at the close of the litigation described a decree had been entered distributing certain stock involved in the litigation and held and controlled by Lansingh while managing the same to the various parties properly entitled to it, yet 455 shares acquired by Lansingh during his trusteeship and thus wrongfully claimed by him in his individual capacity, were not distributed to the said *cestui que trusts*, but were permitted to remain in the possession of said Lansingh until such time as an account might be had and a proper distribution effected. The complainant prayed for an accounting from Lansingh and that Lansingh might be decreed to turn over to complainant whatever stock and money should be found due to him on such accounting.

The bill alleged on information and belief that, aside from this stock and dividends in controversy, Lansingh had little or no property, was in danger of drifting into insolvency or disposing of the said shares and dividends, and spent a large part of his time out of Illinois, and therefore prayed that he might be enjoined from selling, assigning, voting, transferring, delivering or encumbering, or in any way or manner disposing of or intermeddling with said stock or dividends, and from collecting any dividends that might thereafter accrue or be declared on said stock, and from making any assignment of his property or confessing any judgment for the purpose of enabling other persons to obtain his property or liens thereon. It prayed also for a receiver of the said stock and dividends and of all the estate and property, real and personal, of Lansingh.

Upon the same day on which the bill was filed, April 7, 1902, without notice, an injunction was granted in the terms of the bill, on a bond of five hundred dollars, and by the same order a receiver was appointed for all the property and estate of Lansingh.

The writ of injunction and the summons on the bill were served on Lansingh, who filed his answer to the bill June 3, 1902, and at the same time entered a motion to dissolve the injunction and discharge the receiver. This motion was continued for hearing until June 19, 1902, and then apparently postponed from day to day and from time to time for about a month. In the middle of July, 1902, however, just before vacation, the motion was taken up by the court, and after two days had been spent on an oral hearing of it, the chancellor, of his own motion, referred it to a master.

As counsel for appellant here seem to contend that this was a reference of the entire cause on the merits thereof, it may be properly noted that at this time the cause was not at issue, although the answer of Lansingh had been filed contemporaneously with the motion. No replication had, however, then been filed to Lansingh's answer, and the bill was afterwards amended. A general demurrer had been filed for C. J. Dempster, one of the other defendants, whose interests were involved with those of Lansingh. An answer had also been filed by one of the other defendants, whose interests and desires in the litigation appeared by his answer to be identical with those of the complainant. The other four defendants to the original bill do not seem to have appeared to it in any manner at that time.

The order of reference entered July 18, 1902, ran as follows:

"The cause coming on to be heard on the motion of the defendant, Killian V. R. Lansingh, to dissolve the injunction and discharge the receiver herein, and the court having heard the arguments of counsel, and it

appearing to the court that the facts are not fully before this court: It is ordered *that this cause be and the same is hereby referred* to Stillman B. Jamieson, one of the masters in chancery of this court, to take testimony and report to the court his conclusions of fact and of law on the following propositions:"

Then followed twenty-six different questions of law and fact. The twenty-fourth of these questions was, "whether or not delay or lapse of time has precluded the complainant from relief by way of temporary injunction?" And the twenty-fifth and twenty-sixth respectively, were: "Under the facts as found, is the defendant, Killian V. R. Lansingh, entitled to have the injunction entered herein dissolved?"

"Under the facts as found, is the defendant, Killian V. R. Lansingh, entitled to have the receiver heretofore appointed herein discharged?"

The other questions relate to the merits of the controversy or claim raised by the allegations of the bill and Lansingh's answer and are issues of law and fact involving those merits.

(It may be noted that the enumeration of the questions in this order of reference is not identical with that given above, but is from seven to fourteen and seventeen to thirty-four—the missing numbers probably having been elided after the first draft of the order. The number of the questions submitted, however, is twenty-six as stated.)

Many hearings were had before the master. He filed his report June 13, 1903. He recited therein the history of the negotiations and litigation out of which the matter before him grew, noting that the complainant's bill was filed twenty-two years after Lansingh began the task of clearing up the Rosehill Cemetery Company, and six years after that task had been accomplished, and that the injunction and receivership were brought about by an *ex parte* order. His report sets forth the order of reference and the twenty-six separate findings of law and fact which he

was directed to make, prefacing them with the statement: "Upon a motion being made to dissolve this injunction and discharge the receiver, a preliminary argument was made in open court and the whole subject-matter was referred for a hearing, the order of reference being as follows:

"The master reported his conclusions seriatim on the interrogatories contained in the order of reference, his answer to the twenty-fourth being that at least Dempster had been guilty of laches to such an extent as to bar him from the relief asked for, without a full and complete hearing. The report declares that the 'master is of the opinion, and accordingly finds, that the complainant was not as a matter of equity entitled to the appointment of a receiver for the defendant's property, or to the issuance of a writ of injunction restraining the disposition thereof, upon an *ex-parte* hearing, as was done in this case.' Said master further finds, as a matter of law, that if the present hearing had disclosed that complainant's contentions were correct, the court would be justified in continuing the injunction in force even though the original issuance of the writ was not based on sufficient grounds."

To the twenty-fifth interrogatory the master answered, however, that for reasons more fully set forth before in his report in answer to several of the questions of fact involving the merits of the complainant's contentions, he was of the opinion that the injunction should be dissolved. In answer to the twenty-sixth interrogatory he found that the receiver should be discharged. Objections to the master's report which were overruled by him were allowed to stand as exceptions thereto before the chancellor who granted the injunction, and a hearing was had thereon. The exceptions were overruled, the master's report was confirmed, the injunction dissolved and the receiver discharged at complainant's costs, by an order entered September 18, 1903. This order began by a recital that the cause had again come on to be heard "upon

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the motion of said defendant Lansingh heretofore herein made for the dissolution of the temporary injunction heretofore granted herein, and for the discharge of the receiver heretofore appointed herein, and upon the report of Stillman B. Jamieson, master in chancery of this court, on file herein, and upon the objections thereto of the complainant and of said defendants Wesley Dempster and John W. Sweet, taken as exceptions, and upon the proofs and exhibits returned with the master's report and on file herein, and upon the bill of complaint, the answer of said defendant Sweet and the answer of said defendant Lansingh, and upon the affidavits on file herein;" and closed with leave to the defendant Lansingh to file suggestions of damages within ten days from the date of the entry of the order, the hearing upon said suggestions being continued until such time as the court might thereafter determine.

September 26, 1903, Lansingh filed his suggestion of damages, claiming \$19,601.85, made up as follows: \$16,000 for necessary counsel fees paid by him in securing the dissolution of the injunction; \$1,518.25 for one-half of the fees of the master, which half he had been compelled to pay; \$1,266.70 for stenographer's fees paid for transcripts of the testimony and arguments before the master; \$202.40 for stenographer's fees upon various documents necessary in procuring the dissolution of the injunction; \$50 for the services of an expert bookkeeper in making certain schedules introduced in evidence before said master; \$64.50 for witness fees, telegrams and other charges and expenses, in and about the procuring of the dissolution of the injunction, and \$500 for interest on money borrowed by the defendant to enable him to live and pay the current expenses of the litigation while his income and property were tied up by the injunction. October 12, 1904, this suggestion of damages came up for hearing before another chancellor of the Circuit

court. Appellant Dempster moved to postpone the hearing until the main cause was before the court for final disposition. This motion was overruled. Dempster's counsel then moved that the suggestion of damages be referred to a master in chancery, to take proofs and report his conclusions of law and fact. This motion was opposed and overruled.

After a hearing, the chancellor on November 5, 1904, entered a decree allowing to the appellee Lansingh of the amounts claimed by him in his suggestions, \$14,800 out of the \$16,000 paid by him for counsel fees, \$759.12, being one-half of the master's fees paid by him, and \$107.20, being one-half of certain sums found by the court to have been paid for stenographic work and the work of an expert bookkeeper necessary in hearings before the master. The aggregate sum thus allowed was \$15,666.32, and for this amount a judgment was given and execution ordered.

In its decree the court expressly found that two solicitors employed by Lansingh had spent in preparation and in hearings in the case at least 190 days; that all their services had been necessarily rendered in procuring the dissolution of the injunction, and that for their services and those of another solicitor used in the same connection and in combination with one of the two above alluded to, Lansingh had paid \$16,000. The court also found that this was a usual, customary and reasonable charge for such services as were rendered in this matter. But, although the chancellor found that all of said services were necessarily rendered in procuring the dissolution of the injunction, yet "being of the opinion that upon the final hearing of the cause, if any, the evidence taken before the master may be of some value," although in his opinion also, "when the case is finally heard, the solicitors for said Lansingh will have to do the same work they have done before," he deducted in his allowance \$1,200 from the \$16,000 actually shown to have been paid by the appellee for legal services.

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He also, for the same reason, disallowed or deducted one-half of the amounts proven to have been paid by Lansingh for master's fees and for various stenographic and bookkeeping expenses.

The \$1,266.70 paid by Lansingh for stenographer's fees for transcripts of the testimony and arguments before the master, was found to be covered by a stipulation by which this item of costs was to abide the final outcome of the suit, and was therefore disallowed *in toto*, as was also the \$500 claimed for interest on money borrowed.

From this decree the present appeal is prosecuted. The appellant Dempster has assigned thirty-seven errors, challenging in all essential particulars the holdings and proceedings of the chancellor resulting in the judgment. Those argued will be referred to hereinafter in this opinion. The appellee Lansingh has, on the other hand, assigned cross-errors, complaining of the deductions or disallowances made by the court of various items claimed by his suggestions.

One of the contentions made by the appellant is, that the court erred in taking up the suggestion of damages until the cause itself was before the court on final hearing, and it had been determined whether the relief sought by the bill should be granted.

It is urged that because in the order dissolving the injunction "time" was "given until the final disposition of the case in which to file a certificate of evidence and bond," there could be no complete record before a chancellor sufficient to enable him properly to dispose of the suggestion of damages until such a certificate of evidence was filed. This is manifestly a misapprehension of the situation. The time for the certificate of evidence and bond referred merely to the appeal which Dempster had prayed from the order dissolving the injunction and which the court, unmindful of the plainly unappealable nature of the order, had inadvertently allowed.

But appellant also cites *Terry v. Hamilton Primary School*, 72 Ill. 479, *Woerishoffer v. L. E. & W. Ry. Co.*, 25 Ill. App. 84, and *Martin v. Jamison*, 39 Ill. App. 248, to the broader proposition that the statute (chapter 69, section 12 of the Revised Statutes), in providing that the court "after dissolving an injunction and before finally disposing of the suit" may assess damages, etc., means before final decree, but after a final hearing. Counsel for appellee fail to substantiate their reply to this contention that the statute has been changed since these cases were decided; but if these decisions could ever have been held to apply to cases in which the final end sought was something more than, or different from, the injunction, which was preliminarily granted and then dissolved, they cannot be considered to do so since the decisions in *Keith v. Henkleman*, 173 Ill. 144, and 68 Ill. App. 625, and in *Post-Boynton Strong Co. v. Williams*, 57 Ill. App. 434, in which, in cases like the present, the statute receives the natural and obvious construction that the damages on the dissolution of the injunction may be assessed during the pendency of the undecided basic suit. We do not think the chancellor erred in entertaining, hearing and disposing of the claim for damages when he did. Nor do we think that, as claimed by appellant, he should have sent the assessment of the damages to a master, over objection. The cases cited by appellant in which a chancellor was held to have erred in refusing a reference, are all cases in which intricate accounts were involved. Despite the contention of appellant that such was the case in the present controversy, we are unable so to view it. The accounts seem to us simple and easy to understand.

We are brought, then, by the appellant's further assignments of error to the questions: Did the chancellor err in holding with the appellee that damages were in this case properly recoverable for the ill-

advised injunction; and, if not, did he err in making the amount of them so large?

On these questions the appellant first urges that the services rendered and expense incurred were not so rendered and incurred exclusively to secure the dissolution of the injunction, but were rendered and incurred either exclusively or so largely and indistinguishably on the merits of the basic cause, that damages cannot be properly awarded on account of them. Indeed, more than once in his argument it is suggested, by implication or expressly, that the reference was on the merits of the cause, that the master's report also was thereon, and that the hearing was on the report. We do not agree with this contention. It is not necessary, as counsel argue, to suppose that the chancellor hearing the claim for damages was influenced to hold the negative of this proposition by the action of the preceding chancellor in allowing the suggestion of damages to be filed.

When the reference to the master was made the main cause was not at issue and could not be so referred under the statute. The "cause" which was referred to the master was very evidently the "motion" on which the cause had then "come on to be heard." The "facts" which were not fully before the court were the facts which would enable the chancellor, as he thought, to dispose judiciously and correctly of that motion, which the order says was "to dissolve the injunction and discharge the receiver." While there might be a difference of opinion as to how far it was necessary to know these facts to pass on the question actually involved, it was within the discretion of the chancellor (who acted on his own motion) and not at all within the power of the appellee or his counsel, to determine what, in this regard, was thus necessary.

The finding of the master in his report is not without force and significance in this connection—"That

if the hearing had disclosed that complainant's contentions were correct, the court would be justified in continuing the injunction in force, even though the original issuance of the writ was not based on sufficient grounds."

We think the services on the arguments before the chancellor and the master were all performed upon the motion which the appellee had made and brought to a hearing. The appellant, however, claims that even if this be so, no damages are properly recoverable, because the motion was not an independent one to dissolve the injunction, but included a demand that the receiver be discharged. When the injunction was obtained without notice, tying up the appellee's property, a receiver of it all was also appointed in the same order, and the appellee required to turn over all evidences of it to said receiver. Naturally the motion to dissolve the injunction included a motion to end the receivership, which was plainly incidental and ancillary to the injunction. But this made it none the less a motion to dissolve the injunction, nor was there any service or expense in the proceeding which was applicable to the receivership alone and not to the injunction. It would not be reasonable to refuse the indemnity which the law gives for the wrongful issuance of the injunction, because there was an equally wrongful receivership coupled with it which must practically fall if the injunction fell.

The position taken by the appellant that the injunction was nugatory in its effect, even if wrongfully issued, and that therefore the expense necessarily incurred in securing its dissolution cannot be recovered as damages, does not commend itself to us. Even if we should admit that the conclusion properly followed the premise, we could not give it effect, for the premise is not true. An injunction which at once practically stripped a man of the beneficial use, control and income of all his property cannot be called nugatory,

even though the legal title to the larger part of that property was through his own voluntary and revocable act at that time held in trust for him by a third person. The beneficial and equitable interest in the stock in the hands of the trust company could no more be dealt with by the appellee after the injunction was ordered than could the legal title, and other stock and other property not in trust at all were equally affected by its inhibitions. Certainly under such an injunction as this, issued without notice, appellee could not be expected to remain quiescent on the ground that it did not injure him. He was bound to observe it while it was in force, but it was the rightful and natural course for him to seek its dissolution—a course which appellant must have foreseen to be inevitable when he procured it.

Nor do we think the point well taken, that the injunction was as a matter of fact dissolved only in name and not in effect. This contention of appellant is based on the fact that a stipulation tying up the legal possession of the larger part of the stock sought to be affected by the bill of complaint until the conclusion of the litigation, and pledging said stock as security for what might be found due to complainant and others by final decree therein, was entered into by the appellee after the decision of the chancellor that the injunction should be dissolved and the receiver discharged, but before or contemporaneously with the entry of the order carrying said decision into effect.

But in the first place, as we read the record, this stipulation (although suggested as a sort of peace-making proposition by the chancellor after the appellee had announced an intention, notwithstanding his reinstatement in control of his stock, of not eloigning it from the jurisdiction of the court) was a voluntary act of the appellee, by which, without running counter to his own intentions or wishes, he could allay the fears of the complainant as to the disposition of the

stock, and had no influence, favorable or unfavorable, upon the order dissolving the injunction, which had been recommended by the master and unconditionally determined on by the chancellor before the stipulation was mentioned.

In the second place, even were this not so, it requires very little comparison of the injunction writ with the stipulation to show that the provisions of the stipulation fall far short of the prohibitions of the injunction. If it were permissible—which it does not seem to us to be—to regard the stipulation as in any sense answering to a continuation of the injunction, it is manifest that it amounts to a continuation of but a small part of it. Dissolution of an injunction in a material part justifies the assessment of damages as an indemnity for the necessary expense of procuring that dissolution. *Walker v. Pritchard*, 135 Ill. 103; *Brackebush v. Dorsett*, 138 Ill. 167; *Keith v. Henkleman*, 173 Ill. 145.

The appellant's reply to this, that on such a partial dissolution only a portion of the expense can be recovered, is fallacious. If it was the appellee's right to have the injunction thus dissolved in a material matter, he is entitled to be indemnified for the necessary expense of doing it, and there is nothing in this record which suggests that the expenses could have been curtailed by an insistence only on such partial dissolution as would have reduced the injunction to the terms of the stipulation. However, as we have said, we think that a fair construction of the record shows the attack upon it as an entirety to have been not partly, but wholly successful.

Other contentions made by the appellant against the allowance of any damages whatever, are based on the alleged incompetency and insufficiency of the testimony, expert and otherwise, offered by the appellee. Although this point is somewhat elaborately argued by appellant's counsel, we do not think it calls for

extended notice. A careful inspection of the record has convinced us that the chancellor making the assessment of damages did not, as is claimed, allow any unnecessary "conclusions" to be stated, nor did any such conclusions form the basis of his judgment. Nor do we find the hypothetical questions asked the expert witnesses objectionable. Moreover, although we do not deem it necessary to invoke the principle in this case, the chancellor must be presumed to have based his decision upon competent evidence only, if such exists, and this, we think, in any event, plainly did so exist, even were the contentions of the appellant as to all of the questions put to witnesses concerning which there could be reasonable doubt sustained.

Whether the point argued by appellant, that the interest of the solicitors for the appellant in the event of the suit should prevent the allowance of damages to the appellant which include their fees, is to be considered as an argument against the award of any damages whatever, or only as against the amount awarded, of which by far the greatest part consisted of these fees, we are not clear; but it is immaterial, for in neither view do we consider it well taken. Counsel for appellant, in its support, cite an incidental remark in *Jevne v. Osgood*, 57 Ill. 340, 347; but the case there was a very different one. The solicitor refused fees for his own services in that case, was the principal defendant in it, and the amount he claimed was declared exorbitant. In this case, until after the dissolution of the injunction the solicitors were not parties to the suit, and the bill was not directed against them. There seems to us no reason why because, as the chancellor found in his decree, these "reputable members of the bar", "practicing their profession in Chicago", "were especially qualified for the services they performed" "by reason of their knowledge of records and facts connected with the subject-matter of the bill", they should be the only lawyers whom the

appellee made defendant in this bill, could not employ without losing his right to indemnity. The injunction did not directly, at all events, affect them nor their rights, nor is it to be assumed that they would have moved in the matter in behalf of the appellee had they not been retained and compensated or promised compensation by him. They would at all events have been under no obligation to do so. That their private interests and wishes were consistent with their professional duties did not render them improper persons for the appellee to employ or compel the forfeiture of an indemnity to which he was otherwise entitled.

But appellant strenuously insists that even if damages to any extent were allowable, the chancellor erred in their amount. He argues that, as in this case other parties than complainant by answer presented their claims against appellee, the solicitor's fees of the appellant must be considered to have been for services rendered against these claimants other than appellant, and he cannot be made to pay them. But it is obvious that the gist of the appellee's demand for damages, including these fees, is that the services were necessary and rendered in procuring the dissolution of the injunction, and not in defending against any claims whatever, except as those claims were involved in the propriety of the injunction. It was the appellant who procured the injunction, not any of the defendants he brought into the case, and he did so under our statute, at the risk of the damages it caused if it was improvidently granted.

It is also insisted by appellant that compensatory damages only, not exemplary, can be allowed on the dissolution of an injunction, and by implication argued that in the present case the amount of the judgment shows that this rule was violated. It is quite true that exemplary or punitive damages were not allowable, but there is nothing in the record to suggest that they were asked or granted. Indeed, as heretofore stated

and as we shall hereinafter again have occasion to repeat, over \$2,500 which was actually expended by the appellee in and about the securing the dissolution of the injunction was, for one and another reason, not allowed him, and according to the uncontradicted testimony he is to this amount the loser by the injunction.

Counsel, however, urge that although \$16,000 was paid by the appellant to the solicitors who secured the dissolution, and was found a reasonable, usual and customary charge by the chancellor for the services which were by them performed, neither this whole amount nor the whole amount less the deduction of \$1,200, which the chancellor made, should be included in the damages, because a much greater proportion of the services rendered than \$1,200 bears to \$16,000 will be of use both in the shape of available depositions and of the professional knowledge and preparation of the solicitors when the cause comes to ultimate and final trial, and that "only such expenses can be allowed as damages on a dissolution of an injunction as is in excess of or in addition to what is necessary to prepare for trial on the merits."

This material factor in the appellant's case seems to us based on an inaccurate view of the law.

In *Marks v. Columbia Yacht Club and Chicago Yacht Club*, 121 Ill. App. 308, we stated the respective contentions of the parties to be that the appellant argued "that no services which might be called for upon the merits of the case could be recovered for as rendered upon the dissolution of the injunction, while the appellees urged that services necessary and performed in the dissolution of the injunction were recoverable even though they might be also necessary on the merits." We decided that the position of the appellees was correct, Mr. Justice Ball in his opinion noting that the evidence showed that counsel for appellees directed their efforts to the sole object of obtaining a

dissolution of the injunction; that each appellee employed counsel to obtain such a dissolution; that where counsel fees were necessarily incurred in procuring the dissolution of an injunction they might be allowed as damages; that the work done in the case then at bar was directed toward obtaining a dissolution of the injunction and had no reference to the merits of the case, except in so far as the law learned by counsel upon the investigation and argument of the motion might have been used afterward upon the merits of the bill; that it was therefore immaterial that the labor actually expended upon the motion might have been as well expended upon the demurrer which had been filed to the bill, for as that labor had been applied on the motion with the result of bringing about the dissolution of the injunction, the successful party could recover damages for it under the statute.

This decision the Supreme Court affirmed in *Marks v. Columbia Yacht-Club*, 219 Ill. 417, in which Mr. Justice Wilkin, delivering the opinion of the court, repudiated the proposition that it made any difference whether or not the knowledge about the case gained upon the hearing of the motion to dissolve was subsequently used upon the trial of the case on its merits. He says, referring to the previous case of *Landis v. Wolf*, 206 Ill. 392, that the true rule is that solicitor's fees, which are necessarily incurred in procuring the dissolution of an injunction, may be allowed as damages, but that where an injunction is merely ancillary to the principal relief sought by the bill, and its dissolution is only incidental to the defense made, *and the counsel fees are incurred in defending the suit generally or in the management of some other branch of the case, they cannot be assessed as damages.*

We think that under the application of this rule there can be no doubt that the solicitor's fees charged and paid in the case now at bar, were properly recoverable as damages by the appellee. They were

“necessarily incurred in procuring the dissolution of an injunction.” They were *not* incurred “in defending the suit generally or in the management of some other part of the case,” and it therefore makes no difference that the preparation or investigation for which they paid may lighten subsequent labors to be performed on a final hearing of the cause, or were in that sense not “in excess of” or “in addition to” what is necessary to prepare for trial on the merits. We find nothing in the cases cited by appellant, properly considered, which conflicts with this view, and we see nothing in the record contradicting the findings of the decree that “all of the services were rendered and all of the specified expenditures were made, in procuring the dissolution of the injunction.”

The chancellor, however, found that in his allowance \$1,200 should be deducted from the \$16,000 actually paid the solicitors, and this deduction is assigned as a cross-error by the appellee. We think it very doubtful whether it is not our duty to declare this cross-error (3) and another (5), complaining of the disallowance of one-half of the fees of the master in chancery and one-half of certain amounts paid for stenography and expert bookkeeping, well assigned, and to modify the decree by adding to it these amounts. The reasons for their disallowance specifically given in the decree, are not satisfactory according to the view of the law which we have announced. But on the other hand, the amount of such an assessment of damages as this is under certain rules peculiarly within the discretion of the chancellor. It is difficult to know with exactness all the considerations which affected his action. The reasons or argument given in a decree are not always of controlling importance. *Higgins v. Peterson*, 64 Ill. App. 256; *McNicholas v. Tinsler*, 127 Ill. App. 381; *The Earl of Ilchester ex parte*, 7 Vesey, Jr., 348, p. 375. *Barbee v. Morris*, 221 Ill. 382.

In an oral opinion, before entering the decree, the

chancellor placed the reduction in the master's fee and stenographer's fees on the probability of a stipulation which would reduce subsequent expenses in the litigation, and in his discussion of the charges of the solicitors, he says: "The counsel were certainly warranted in charging *something like* they have charged here."

The amounts mentioned in the eighth paragraph of the decree aggregating \$1,266.70 and included in the appellee's computation and claim, we think, for the reasons stated in the decree, were properly disallowed, and we have with hesitation concluded not to disturb the judgment, but to affirm it as it stands. Even thus it undoubtedly seems large for the damages on a dissolution of an injunction, but the chancellor was right in his finding and in his expression of opinion before the decree, that the solicitor's fees were not unreasonable in view of the time and interests involved, and that the evidence to that effect was uncontradicted.

Nor does the assessment of them as damages against the appellant conflict with natural justice. The injunction was obtained without notice. It was a matter of great importance to the appellee pecuniarily. It suddenly took from him the control of all his property. If improvidently granted, it was of the highest importance for him to secure the undoing of the injustice. We do not think that he took unusual or unreasonable means and precautions to obtain what the court afterward decided were his rights. To so obtain them cost him all that this assessment of damages gave him, and even more. Satisfactory evidence that the charges made him were reasonable was produced. It was not contradicted. Although our law does not provide for an indemnity for the expenses caused to a defendant by an ordinary action wrongfully brought, it does supply such an indemnity for an injunction wrongfully obtained and afterward dissolved. When the appellant secured his injunction on an *ex parte*

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hearing on commencing his suit—practically thus beginning instead of ending his proceeding with an execution—he certainly took and was justly burdened with the risk of having to pay this indemnity, if it were decided that his drastic proceeding was ill-advised.

The decree of the Circuit Court is affirmed.

Affirmed.

William Konow v. Roy Nichols.

Gen. No. 12,579.

1. CITY COURTS—*extent of jurisdiction of.* City Courts have concurrent jurisdiction with the Circuit Court, within the city where they may be situated, in three classes of cases, namely, all civil cases, all criminal cases arising in said city, and appeals from justices of the peace in said city.

2. PERSONAL INJURIES—*when liability for, not established.* Neither agency for nor partnership with the defendant of the person alleged to have been actually responsible for the injury involved herein, having been satisfactorily proved, the judgment must be reversed and the cause remanded.

Action in case for personal injuries. Appeal from the City Court of Chicago Heights; the Hon. HOMER ABBOTT, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed October 8, 1906.

Statement by the Court. This is an appeal from a judgment of \$1,800 by the City Court of Chicago Heights, rendered by that court May 13, 1905, in favor of appellee, who was plaintiff below, against appellant, who was defendant below. The judgment was on the verdict of a jury in a personal injury case. The verdict was for \$5,000, but plaintiff, acting under the practical compulsion of the trial court, in order to avoid the awarding of a new trial, remitted all above \$1,800. A new trial and a motion in arrest of judgment were then denied, and judgment for \$1,800 rendered upon the verdict.

Although none of the errors assigned upon the record questions the jurisdiction of the court below, that jurisdiction is challenged in the brief and argument of appellant, who says that as it appears on the face of the record that the subject-matter of the suit arose outside of the territorial jurisdiction of the city of Chicago Heights, the judgment is a nullity and should be so declared by this court.

An assignment of error is made on the denial by the trial judge of the motion in arrest of judgment, and it is argued by the appellant that the pleadings of the plaintiff do not show a cause of action.

The plaintiff began his suit in August, 1904. At that time he filed a declaration consisting of two counts in which he alleged a partnership between the appellant Konow and one Fred Bloom in the business of pressing hay with a steam hay press, and claimed damages by reason of the negligence of appellant in operating the press and engine whereby plaintiff's leg was broken.

A demurrer was filed and sustained to each count of this declaration September 22, 1904. Plaintiff having filed three additional counts with substantially the same allegations on September 24, 1904, a demurrer was filed to said counts which was sustained in February, 1905.

Thereupon on February 15, 1905, the plaintiff filed four additional counts, to which the defendant pleaded not guilty, and on which the cause was tried.

The first of these counts in substance alleges that on November 7, 1903, the defendant Konow and Fred Bloom were engaged in the business of pressing hay, with a press and engine, "under the care and management of said Bloom for himself and for said defendant;" that the plaintiff Nichols, a minor of twenty years, inexperienced in the business, was in the service of the defendant and Bloom as a helper under the direction of Bloom; that on the farm of one Raybeck,

near Matteson, in Cook county, it became necessary in the prosecution of the business to put the hay press in a barn by pushing the same up a steep incline by means of the steam engine; that thereupon it became the duty of the defendant to furnish the plaintiff a reasonably safe place in which to do the work he was required to perform; that neglecting said duty, the defendant set the plaintiff to work to hold a stake between the engine and hay press for the purpose of pushing by the engine the hay press up the said steep incline into said barn; that while the plaintiff in the exercise of due care was holding the stake, Bloom, for himself and for the defendant, so carelessly managed the engine that the stake held by the plaintiff was caused to slip off said hay press and engine, by means whereof the hay press ran back against the engine and the plaintiff thereby was badly injured.

The second count is to the same purport except that it alleges the accident to have been caused by Bloom's carelessly causing the engine to give "sudden jerks, lurches and motions," making the stake slip off said engine and press.

The third count alleges that the plaintiff was by Bloom, "for himself and for said defendant," set to work to hold the stake between the engine and the press without any sockets, cleats or other means of preventing said stake from slipping from said engine and press being provided, and that by reason of the failure of the defendant "to provide safe and proper means to hold said stake in place by cleats, sockets or otherwise," the accident happened.

The fourth count adds to the allegations of the third that Bloom, by means of the engine, negligently pushed the press up the steep, rough and uneven incline at a high rate of speed without providing cleats, sockets or other means to prevent the stake slipping off, etc.

The trial took place on February 27 and 28, 1905. The plaintiff offered the testimony of himself and of

his brother, who was present at the time of the accident, and of a surgeon who treated his injuries.

A motion was then made by the defendant for a peremptory instruction, which was refused.

The defendant thereafter presented the testimony of three persons who were eye-witnesses of the accident, as to the circumstances of the same, and also the testimony of himself and of other witnesses in relation to his connection with the business and the machine at the time of the accident, the contentions of the defense being that there was no liability on the part of anyone for the accident, and that in any event the defendant Konow had no connection therewith.

The plaintiff produced in rebuttal the testimony of certain witnesses, and the defendant was allowed to recall in surrebuttal his original witnesses. Various rulings made on the admission of evidence were excepted to by the defendant, and admission of improper evidence for the plaintiff and exclusion of proper evidence for the defendant are assigned as errors.

On the conclusion of all the evidence the motion for a peremptory instruction was renewed by the defendant, and again denied by the court, which ruling is assigned for error.

Six instructions, numbered from 1 to 6, were asked by the plaintiff and given. The giving of each of these instructions is assigned for error. Fifteen instructions were tendered by the defendant, numbered from 1 to 15. Numbers 1 to 6 inclusive and numbers 14 and 15 were refused, and the others given. The refusal of each of the eight refused instructions is also assigned for error.

After the verdict a written motion for a new trial was submitted and its denial is assigned for error, and the following grounds, in addition to rulings on evidence and instructions, were particularly insisted on as showing such error: The verdict was against the weight of the evidence. The verdict was excessive and

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was not cured by the *remittitur*. Newly discovered evidence which justified a new trial was presented to the court by sufficient affidavits. A counter-affidavit was improperly heard in opposition to the motion for a new trial.

GEORGE A. BRINKMAN and JAMES C. ESSICK, for appellant.

B. J. WELLMAN, for appellee; ARTHUR A. HOUSE, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Without reference to the want of any assignment of error on this record in relation to the jurisdiction of the court below to entertain their suit, our decision must be against the appellant on this contention.

It is our opinion that the true construction of section one of "An Act in relation to Courts of Record in Cities," approved May 10, 1901, gives to City Courts concurrent jurisdiction with the Circuit Court within the city were they may be situated, in three classes of cases: first, all civil cases; second, all criminal cases arising in said city; and third, appeals from justices of the peace in said city.

We think if the legislature had intended to confine the jurisdiction to "civil and criminal cases arising in the city", it would have so expressed itself, and not said "*all* civil cases", and (as we read it) in contradistinction thereto, "*all* criminal cases arising within the city."

The motion in arrest of judgment was based on the alleged failure of the declaration to state a cause of action. As demurrers were sustained to all but the four counts last filed, we have only these to consider.

We incline to the opinion that the point made on the insufficiency of these counts would at least be good on demurrer. They are certainly inartificially drawn. It

is difficult to determine with what the defendant is charged. Bloom, who is alleged without any definite specification of the relation to the defendant in which he acted, to have been "associated" with the defendant in the operation and use of a machine, is charged with negligence in the management of it, causing the injury. The position of the plaintiff which made the injury possible was, it is alleged, determined by the order of Brown, acting "for himself and the defendant". But it is not alleged by what authority he was so acting. The appellant insists that counsel for appellee disclaimed, during the trial, the theory of partnership and must be held to such disclaimer. Such a disclaimer appellee's counsel repudiate, claiming in their argument that a partnership was both alleged and proven. It is only by rejecting the alleged disclaimer as of no significance and at the same time greatly stretching the doctrine of a cure of defective statement of a cause of action by verdict, that this cause can be brought under the doctrine of *Ashworth v. Stanwix*, 3 Ellis & Ellis, 701, and *Melloes v. Shaw*, 1 Best & Smith, 437. In these cases the declaration charged the negligence directly to the defendants jointly, and it was left to the proof to show the personal negligence of one defendant and the partnership of the other. On the assumption, however, that the motion in arrest was properly overruled, an assumption which we make, although with hesitation, as the law of this case, and that after verdict the declaration was good as stating a joint liability (it certainly does not state an agency), the question arises on the evidence whether the case is brought within the rule of the leading cases referred to by satisfactory proof of Konow's operation of the engine and press in partnership with Bloom. We are of the opinion that it is not, and that the preponderance of evidence on this essential point is not with the plaintiff. If the defendant were not Bloom's partner

in the operation of the engine and hay press, no liability, as we think, can be predicated under the pleadings as they stand, for no other form of agency or representation is presented by them.

It is possible that a clearer demonstration of the exact relations between Konow and Bloom in connection with the operation of the hay press may be made at another trial, if it should take place, and therefore we do not deem it desirable to develop our conclusions on the evidence beyond the statement that, as the record now stands, we do not think that the plaintiff has sustained that burden of connecting Konow with this accident which the law placed on him as a condition of recovery in this case.

This being our opinion, we are made not the less willing to remand the cause for another trial by the fact that further evidence bearing on the question of partnership is stated by the motion for a new trial to have been newly discovered.

It is unnecessary for us under the circumstances to decide whether the evidence said to be producible is merely cumulative, nor whether sufficient diligence to procure it at the trial had been shown, nor whether the second affidavit of Bloom should have been allowed to be read, nor whether that second affidavit destroys the effect of the one before made by him. It is proper for us to note, however, our opinion that it is fortunate that on another trial, should it take place, the testimony of the witness Bloom, not in *ex-parte* affidavits, but on examination and cross-examination, will apparently be available.

Appellant contends that the instruction on the question of partnership, marked by him six and offered and refused, should have been given and that the refusal to give it was error. We do not think so. The jury were sufficiently instructed on this question by the instructions which were given marked 7, 8, 9, 10, 12 and 13, although we doubt much whether, as ap-

plied to the pleadings in this case, instruction 8 was not more favorable than it should have been to the appellee. The vice in the record as we view the matter, however, is not that the law was not correctly laid down to the jury, but that the jury did not follow it as it was declared to them.

The objection urged by appellant to the fifth instruction we think is based upon a misconstruction of its meaning. It might perhaps have been more precisely worded, but we do not think it misled the jury.

Instruction No. 6 is open to grave criticism. The case is certainly a close one on the facts as to the liability or responsibility of anyone to the plaintiff for this injury. We do not purpose to discuss the evidence with relation to this phase of the case, inasmuch as it may be tried before another jury who are to judge of the facts, but we note our view of it, to emphasize the importance of careful instructions, on the subject of the plaintiff's due care and the employer's liability for the result of his orders.

What we have said indicates that we do not think the court erred in refusing to take the case from the jury by a peremptory instruction.

As the judgment must be reversed and the cause remanded for reasons above given, it is unnecessary for us to express our opinion upon the weight of the evidence as it stands in the present record, as to the liability or responsibility of any person other than the plaintiff for the accident, or upon the point urged by appellant that the original amount of the verdict shows that prejudice and passion ruled the jury, and that this inference should be fatal to the judgment notwithstanding the *remittitur*.

The judgment of the City Court of Chicago Heights is reversed and the cause remanded.

Reversed and remanded.

Fred Slaughter v. Benjamin G. Johnson.

Gen. No. 12,717.

1. **BILL OF EXCEPTIONS**—*filing of, within time specified by order, not jurisdictional.* The signing and sealing of the bill of exceptions is, but the filing thereof within the time prescribed by order of court is not, jurisdictional.

2. **LEASE**—*terms of, cannot be varied by parol.* The terms, stipulations and undertakings of a written lease cannot be varied or enlarged by parol.

3. **LANDLORD AND TENANT**—*when not obligated to furnish heat, etc.* In the absence of stipulation contained in the lease or agreement of letting, the landlord is under no obligation to furnish the tenant with heat or hot water.

Action of debt. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

F. H. NOVAK, for appellant.

EDWARD H. MORRIS, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

A motion by appellee and a cross-motion by appellant were reserved to the hearing in this cause. The motion of appellee was to strike the bill of exceptions from the record and to affirm the judgment. The cross-motion of appellant was for leave to supply deficiencies in the record on a suggestion of diminution of the same. This motion was, however, according to the suggestions filed in support of it to be withdrawn if the original motion of appellee were denied. The motion of appellee is denied and the motion of appellant may be considered, therefore, withdrawn.

The motion of appellee to strike the bill of exceptions from the record is based on the said bill not having been filed according to the record, within the time

prescribed by the Circuit Court. The filing is formal and not jurisdictional. The presentation and signing were within the time in which the court retained jurisdiction of the case for the purpose of signing and sealing the bill of exceptions. That the bill does not bear a file mark of an earlier date, seems more than probably to have been a mistake or misprision of the clerk, but in any event it is immaterial so far as this motion goes. So is the absence of a separate entitlement to the assignment of errors appended to the record and of a descriptive addition to counsel's name at its end. The assignment is sufficient in form.

But the errors are not well assigned. There is plainly no merit in the appeal. The action is on an appeal bond given on an appeal from a justice of the peace to the Circuit Court of Cook County November 23, 1903, by R. A. D. Shaw as principal and Fred Slaughter, the appellant, as surety.

The original suit was in forcible detainer. It was brought by Johnson, the appellee, against Shaw to recover possession of a flat on the second floor of a certain house in Chicago owned by Johnson. The flat had been leased by Johnson to Shaw, by a written lease from June 1, 1903, to April 30, 1904, at \$33 a month, payable in advance. It being alleged by Johnson that rent was in arrears, and the lease terminated by a five days' notice under the statute, the forcible detainer suit was brought. It resulted in a judgment before the justice for the plaintiff Johnson. Shaw appealed, and Shaw as principal and Slaughter as surety then gave the bond sued on in this case. It was for \$400 conditioned in the usual form for the payment of costs and all damages and rent due or to become due by reason of the withholding of the premises until their restitution.

The appeal was dismissed in the Circuit Court for want of prosecution, April 4, 1904. Shaw vacated the premises in March, 1904. He paid no rent for November, 1903, nor during the subsequent months.

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In September, 1904, Johnson began suit on this appeal bond before a justice of the peace against Shaw and Slaughter, but before hearing dismissed the suit as against Shaw. The trial before the justice (a jury having been called) resulted in a verdict and judgment for \$125 and costs against Slaughter. From this judgment Slaughter appealed to the Circuit Court, where, after the evidence was in, the trial judge instructed the jury to find for the plaintiff in the sum of \$182.35. The jury returned a verdict accordingly. The defendant moved for a new trial and in arrest of judgment. These motions were overruled and judgment rendered on the verdict. Thereupon this appeal was taken.

The errors assigned and argued are that the court erred in refusing to admit proper testimony offered by the defendant in support of an alleged recoupment against the plaintiff's claim and in consequence erred in instructing the jury to find for the plaintiff, and in denying the motion for a new trial; and also that the verdict is excessive and that improper evidence was admitted upon which it was based.

We do not find these contentions sustained. The claim for recoupment consisted (according to a statement filed before the justice and which without passing on the question of whether it is properly in the record here we may consider *pro hac vice* as a pleading) of certain items of expense amounting to \$200.66 rendered necessary, as it was claimed, by the failure of the plaintiff to furnish the leased premises with heat and hot water.

The first question asked by the appellant's counsel, the exclusion of which is complained of, was on cross-examination of the plaintiff. Johnson was asked, "Under the terms of your lease with Mr. Shaw, you were to furnish him hot water, heat for the flat and cold water?" This question was objected to, and the objection was sustained. This ruling was correct. The lease had been previously introduced in evidence

and spoke for itself. The proposed evidence was incompetent to vary it and was equally incompetent to put a construction on it.

The next question was an inquiry of Johnson whether during the time for which he was claiming rent he had not failed to furnish hot water and heat. This was also objected to and ruled out. This ruling also was proper, for there was no inference that could be drawn from the lease in evidence or from any other evidence in this case, that the landlord had contracted to furnish or was under any obligation to furnish heat or hot water to his tenant. On the contrary, the rule of law was the other way.

Although counsel afterward stated that there was no way of heating the flat except by heat furnished by the landlord, he did not then or at any other time offer to prove that fact, which he should have done if he wished to raise the question of whether there was an implied covenant to furnish heat with the premises. The statement of the recoupment claim that the tenant paid for gas to "heat the grate," would not seem to bear out the statement of counsel. It is unnecessary, perhaps, to say that no implication lies in what is here said that in any event the damages alleged here could be recouped in this action, or the lease held to include the adjuncts claimed by the appellant. It is needless to discuss or decide these questions, for they are not properly raised.

When Mr. Shaw, the tenant, took the stand he was asked to "state what was the condition of the premises as to the landlord furnishing the heat or hot water as *required by the lease.*" The question was objected to and excluded. There can be no doubt of the propriety of this ruling for the reasons before given and because of the plainly unauthorized assumption contained in the question.

The witness was then asked, "to state the condition of the flat as to being habitable, and to what inconven-

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ience he was put as claimed under the 'Bill of Particulars and Recoupment.' " He was not allowed to do this, and appellant's counsel then stated that he was ready and offered to prove by five witnesses "that the complainant during the period for which the rent was claimed, failed to furnish heat and hot water *as stipulated in the lease and agreed to*, and that this was the reason of the dispute between the parties;" to which offer an objection was sustained. There was no error in these rulings. The lease contained a covenant that the lessee had received the premises in good condition, and another in effect that he would keep them in that condition, which is sufficient by itself to show that the interrogatory put to Shaw was immaterial. The offer to prove by witnesses that no heat was furnished, contained, not only by implication but expressly, the unwarranted assumption concerning the landlord's duty heretofore alluded to.

We do not think that the lease was improperly introduced in evidence. We do not see how the defendant could complain of it or expect on his own theory to make any case without it. Apart from this, however, it furnished a proper measure of damages, and of the amount that had "become due" for rent up to the time the appellant abandoned his contention that he held under the same and vacated the premises. The damages are not excessive under the terms of the lease and bond.

Under the evidence, as it stood after these rulings which we have approved, there was no doubt of the propriety of the instructed verdict.

The judgment of the Circuit Court is affirmed.

Affirmed.

Arthur R. Clark et al. v. Andrew Hoffman.

Gen. No. 12,730.

1. ACCOUNT STATED—*what evidence tends to prove.* An indorsement by the debtor of "O. K." upon an itemized account, is evidence which tends to prove an account stated.

2. JOINT LIABILITY—*when burden of proving defendants' rests upon plaintiff.* The burden of proving the joint liability of the defendants is upon the plaintiff where the defendants have filed a plea denying joint liability.

3. PARTNERSHIP—*held not established.* Held, that the evidence in this case did not establish a partnership, either in fact or in law, under the doctrine of estoppel.

4. PARTNERSHIP—*how proof of existence of, may be made.* Under the circumstances of this case, it was competent to inquire of employes or former employes of a concern alleged to be a partnership as to whether or not such concern was in fact a partnership.

Action of assumpsit. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed October 8, 1906.

WHITE, MABIE & CONKEY, for appellants.

F. A. BINGHAM, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court against the appellants jointly (defendants below) in favor of appellee (plaintiff below) for \$1,411.09 and costs.

The plaintiff's declaration in the trial court consisted of the common counts, and the evidence of indebtedness introduced under it was a statement of account shown to have been presented by the plaintiff to Arthur R. Clark, one of the defendants, and by him indorsed, "O. K. A. R. Clark & Co." It was introduced in evidence and called Plaintiff's Exhibit H.

The defense made below (where the trial was be-

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fore a jury) and the attack made here on the verdict and judgment are based on two propositions: the first, that the document introduced as Exhibit H did not, under the evidence in this cause, constitute or establish an account stated against anybody; and, secondly, that if it did prove an account stated against "A. R. Clark & Co.," it was not proof of any joint liability of the defendants, Wallace G. Clark and J. M. Trainor not being proven members of any firm known as "A. R. Clark & Co.," there being in fact no such firm; and "A. R. Clark & Co." being a corporation duly established under the laws of Illinois.

These defenses were insisted on below under the general issue and a further verified plea signed by the defendants denying joint liability.

After the verdict against the defendants below, a motion for a new trial and a motion in arrest of judgment made by them were overruled and judgment entered on the verdict. In this court errors are assigned on the admission and exclusion of evidence, on the giving and refusing of instructions, and on the refusal of a motion for a new trial, because the verdict and judgment were against the law and the evidence. It is also claimed under the assignment that the court erred in not peremptorily instructing the jury to find for the defendants, as requested at the close of the plaintiff's evidence and at the close of all the evidence.

The first ground of defense above mentioned may be here dismissed from consideration. Although evidence was introduced by the defendant below that the indorsement "O. K." with the signature of "A. R. Clark & Co." made by Arthur R. Clark on the account when presented, was not made as, or understood to be, an admission of the accuracy of the bill, it was at least for the jury to determine whether it were not. We should certainly not think under the evidence of disturbing or questioning the finding of the jury that it was. We shall proceed, therefore, in our disposition

of this cause, upon the assumption that Arthur R. Clark by his indorsement on Exhibit H, bound as to an account stated anybody and everybody whom he had a legal right so to bind by the signature of "A. R. Clark & Co."

We have no doubt that if there were a partnership under that name, doing business with Hoffman, Arthur R. Clark had a right thus to bind his partners. Under that assumption it was an act in the scope of partnership business, in which he was the agent of all his other partners.

But this is not sufficient to justify a judgment against the defendants or any of them. There was a plea of denial of joint liability, and a plea of the general issue, on file, and it is conceded that the burden of proving the joint liability of the three defendants rested on the plaintiff. The contention made by the appellants that this burden was not sustained, makes a much more serious question in this case than is the effect of the "O. K." indorsement on the rights of "A. R. Clark & Co." If "A. R. Clark & Co." was a partnership, its members are liable for the account; if it were a corporation and Arthur R. Clark was its managing officer, the corporation is so liable.

But does the evidence show any such firm or matters of estoppel which prevent the defendants, or any of them, from denying it? And if it does show such a firm, are the appellants shown to be its members? These are the real questions in the case. We have examined with great care not only the abstract but the record, and we cannot escape the conclusion that the jury disregarded the weight of the evidence in this case, and were led rather by the wish to find a remedy for the plaintiff than by a desire to follow the law.

It is in the first place apparent that for two or three years the plaintiff Hoffman did business with A. R. Clark, individually; that at about the time a corporation under the name of A. R. Clark & Co. was organ-

ized and ready to do business, the plaintiff's account was changed to A. R. Clark & Co. and was so continued.

All the defendants swore that there was no copartnership of A. R. Clark & Co., and that they belonged to no firm or joint business concern composed of A. R. Clark, W. G. Clark and John M. Trainor. So far as they were allowed by the rulings of the court, they and the employes of "A. R. Clark & Co." testified that under that name a corporation, and a corporation only, did business; that such a corporation did exist; that its place of business was the office where A. R. Clark was found and interviewed by Hoffman; that its ostensible object was "the construction of buildings," the business out of which this account sued on grew; that A. R. Clark was its responsible head, president and manager. But plaintiff contends, nevertheless, that Wallace G. Clark and John M. Trainor, despite their explicit denials and despite the fact that he can bring no direct evidence of any partnership connection between them and Arthur R. Clark, or of the existence of a firm of A. R. Clark & Co. (except the alleged admissions hereinafter alluded to), were with Arthur R. Clark responsible as individual partners in a copartnership under the same style and name as that of the corporation.

Of course the contemporaneous existence of such a firm and of such a corporation, each with the name of A. R. Clark & Co., was possible, but to establish it, the burden of affirmative proof was on the plaintiff, and then beyond that the burden of proving that A. R. Clark, W. G. Clark and J. M. Trainor were members of such firm. To sustain this position the plaintiff offered evidence that A. R. Clark, W. G. Clark and J. M. Trainor occupied the same office; that individually they had signed a lease together of those offices; that they had all at times talked with him of business which A. R. Clark & Co. was doing with him; that in their

advertisements and correspondence "A. R. Clark & Co." was or were described as contractors and builders, in the plural and not in the singular number; and, perhaps most significant fact of all, that the letter-heads used by "A. R. Clark & Co." in doing business with him, instead of bearing the name of the corporation, "A. R. Clark & Co.," bore that of "*Arthur R. Clark & Co.*"

But not all these things together, nor any "general reputation," nor the "constant association" of the parties, nor the "natural commercial presumption," as it was expressed by one witness, can overcome the explicit denials of Wallace G. Clark and J. M. Trainor that they were interested with A. R. Clark in any firm or copartnership or in any joint business with Hoffman. Even if the strenuous contention of the appellee's counsel were to be considered well taken, that Arthur R. Clark intended the incorporation of the business he had theretofore been pursuing under his individual name to be comparatively secret, in order that he might use it to avoid individual liability when hard pressed, this would furnish no ground for holding his brother and Trainor individually liable with him, whatever its effect would be upon his own position.

The occupation of the same office and the execution of the lease, and indeed other business associations of the parties, were explained by the admitted fact that there was an active firm in the real estate business, composed of Wallace G. Clark and John M. Trainor, under the name of Clark & Trainor, and that this firm frequently employed or contracted with "A. R. Clark & Co." to construct buildings on land belonging to them.

But the plaintiff produced testimony also tending to prove, as he claimed, that W. G. Clark and Trainor had both admitted the existence of a firm of A. R. Clark & Co., of which they were members. It seems to be conceded that as these alleged admissions were

not made until after the credit was given for the material for which this suit was brought, they do not operate by way of estoppel. They are held, however, to be proof of the actual prior existence of the firm. But the remarks seem to fall very far short of overweighing the positive testimony of the same persons to the contrary. They are denied by those persons, and so far as they are of significance at all, consist not of assertions that there was such a copartnership and that they were members of it, but of the incidental use of the word "firm" for what they now claim to be the corporation. They are also certainly minimized in importance in the chief instance by what accompanied and followed them.

We do not go so far as to say that leaving out all countervailing evidence, there was nothing in the plaintiff's case tending to establish his claim, and therefore do not hold it error to have refused the peremptory instruction for the defendants which was asked for. *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578.

But we think the clear weight of the evidence was against the contention of the plaintiff in regard to the partnership and joint liability, and must reverse the judgment and remand the cause.

It would not be useful for us to take up seriatim the rulings on evidence complained of, and we shall confine ourselves to brief and general observations thereon.

The proposition of appellee that "where in a suit against two or more persons as partners, sufficient evidence has been introduced to raise a fair presumption of the existence of a partnership, the acts and declarations of each are admissible against the others to strengthen the *prima facie* case already made," we do not understand is controverted. The question arises on its application.

On the one hand it is argued that in this case no such

“fair presumption” arose; on the other, that the evidence establishing it was “very clear and convincing.”

We have indicated that we think there was evidence which, in the absence of all countervailing evidence, sufficiently tended to establish the plaintiff's contention about the existence of a partnership, to forbid the peremptory instruction asked; but the precise question involved in the admission of the acts and declarations of one of the defendants as admissions of all, is a different and in this case a difficult one. In view of the contentions of the plaintiff and the impossibility of his presenting his case at one view, we think the court adopted the safer and better course in allowing the evidence to be heard which was objected to on this ground, and reserving its ultimate effect for future ruling on possible motions to strike out or for instructions limiting its consideration.

The trial judge, in our opinion, however, erred in the other direction in too great strictness in the exclusion of testimony offered by the defendants.

We cannot see why employes for many years of that business concern called “A. R. Clark & Co.,” which was doing business with the plaintiff, should not be allowed to testify whether that concern were a corporation or a partnership. They were disinterested witnesses in the legal sense, and they had the best means of knowledge. Their statement would not have been the statement of a legal conclusion or of an opinion in any objectionable sense, nor would it have been usurping the function of the jury, as claimed. The case turned upon the character and nature of the business concern known as ‘A. R. Clark & Co.’ carrying on a particular business and occupying certain offices, and its employes, paid by it and constantly concerned with its affairs, certainly ought not to be considered incompetent witnesses on this point. Their testimony would not have been competent had they undertaken

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to testify as to the existence or non-existence of joint and individual liability on the part of the defendants arising from estoppels or false representations; but it is not claimed in this case that it is by estoppel Trainor and Wallace Clark are made liable jointly with Arthur Clark. Such representations as were alleged to be made as to their being partners, was not the origin of the credit given, and the doctrine of estoppel does not apply. *Thompson v. First Nat'l Bank of Toledo*, 111 U. S. 540.

It was the *fact* of the existence of a partnership composed of the three appellants which was in dispute.

We find no error in the instructions. Those given stated the law correctly, and those requested by the defendants which were refused were, we think, covered by those that were given.

The twenty-first instruction requested by the defendants was faulty in form, and its refusal was therefore proper and is not pressed in argument as erroneous; but the proposition therein contained that the belief of the plaintiff, if it existed, that he was dealing with a copartnership and not a corporation, did not make the defendants liable, if in fact the concern he was dealing with was not a copartnership, but a corporation, self-evident as it is, is yet the kernel of the questions involved in this case, and might well have been impressed on the jury by an instruction.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Conrad Czarra v. Babette Czarra.

Gen. No. 12,784.

1. **SOLICITOR'S FEES**—*marriage relation not essential to allowance of.* A divorced wife is entitled to an allowance of solicitor's fees incurred in seeking to compel the payment of alimony decreed to her by the order of divorce.

Divorce proceeding. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

J. S. DUDLEY, for appellant.

FREDERICK A. BROWN, for appellee; ELMER E. LEDBETTER, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

The appellee, August 19, 1903, obtained a divorce from the appellant for extreme and repeated cruelty. In the decree of divorce it was provided, among other things, that the appellant should pay appellee \$65 a month, as and for permanent alimony, said sum to be due and payable upon the 14th day of each and every month thereafter.

On January 17, 1905, on a rule previously made, there was an order entered which committed the appellant to jail for contempt of court in not paying arrears of \$260 of the decreed alimony. From this order of commitment Conrad Czarra appealed to this court, and on March 1, 1906, this judgment order was affirmed by us. *Czarra v. Czarra*, 124 Ill. App. 622.

On January 17, 1905, another rule was obtained requiring appellant to show cause why he should not be found in contempt of court for failure to pay certain other instalments of said alimony. The appellant filed substantially the same answer as to the pre-

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ceding rule, and on February 15, 1905, it was heard on substantially the same record. The court then entered an order finding that the respondent was in arrears of alimony in the sum of \$130; that he had failed to show cause why the same should not be paid, and that he was in contempt. The order provided that he be committed to jail until he paid the sum of \$130 into court for the use of complainant, or until released by due process of law. The order also contained the following clause: "On motion of complainant's solicitors, solicitors' fees of \$50 are hereby allowed complainant and ordered to be paid at this time."

From this order the appellant appealed to this court, and contends: First, that the position of the appellee through her misconduct as shown by the record, is such that the court should not have committed appellant for contempt at her motion and instance. Second, that the record shows that appellant was not in contempt; that his failure to comply with the decree of the court was not due to obstinacy or wilfulness, but was involuntary and because of pecuniary inability; thirdly, that the order of commitment is void for indefiniteness and uncertainty; and, fourthly, that the part of the order requiring the appellant to pay his divorced wife's solicitors' fees for services rendered after a final and unappealed decree of divorce, and not affecting the marriage relation, is erroneous (a) because it is not authorized by the common law or by statute; and (b) because it was entered without a showing of appellee's inability otherwise to maintain or defend her suit.

The first three of these contentions must be considered as disposed of adversely to appellant by our decision in the appeal from the order of January 17, 1905, before noted. This leaves for disposition only the question raised by the appellant on the final clause of the order of February 15, 1905, requiring the pay-

ment by him of \$50 solicitors' fees to the complainant. On this point a vigorous argument is made by appellant's counsel, that it is the existence of the marriage relation alone which gives, either at common law or under our statute, the right to a court to require a defendant to provide means to the complainant to litigate, and that as in this case the marriage relation was ended by the decree of August 19, 1903, no such right existed on February 15, 1904.

In support of this contention he urges the reasoning of various opinions in cases where allowances were made and refused.

But we are not disposed to refine too closely in this matter. There seems to us nothing, as counsel argue that there is, inherently inconsistent with justice and fairness in the allowance against a delinquent debtor for alimony of the necessary expenses for prosecuting the right which the statute and the court have given his former wife.

On the other hand, we can see that it would often defeat the whole object of the alimony statute to deny to the divorced wife the means of compelling such an allowance.

Among the cases brought to our attention by the respective arguments of counsel, nothing seems to us more in point than *Stillman v. Stillman*, 99 Ill. 204. If it be within the power of a court under the statute (chapter 40, section 15 of the Revised Statutes) to allow solicitor's fees incurred in resisting a petition of a divorced husband for the reduction of alimony, we see no reason in principle or under the terms of the statute why it should not be so allowable in the case of the prosecution by the divorced wife of her right to enforce alimony.

The further point is made, however, that if allowable at all under the statute, such solicitor's fees are only allowable on proofs of the complainant's need, and that it was error in this case to order the payment

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without such proof. It is true that the power and discretion of the court might be so abused by an order making such an allowance, without proof of complainant's inability, that we should feel justified in interfering, but we do not think this is such a case, or that the taking of evidence on the matter is jurisdictional. The Superior Court had formerly had these parties before it, in a matter to which this proceeding was purely ancillary. It was acquainted with their circumstances. If the relative pecuniary situation of the parties was such that this allowance was an abuse of discretion and of statutory power at the time it was made, it should have been made so to appear affirmatively by the defendant. We do not think it did so appear.

The judgment of the Superior Court is affirmed.

Affirmed.

Conrad Czarra v. Babette Czarra.

Gen. No. 12,733.

The decision in this case is controlled by Czarra v. Czarra, *ante*, p. 430.

Divorce proceeding. Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1905. Affirmed opinion filed October 8, 1906.

J. S. DUDLEY, for appellant.

FREDERICK A. BROWN, for appellee; ELMER E. LEBETTER, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an appeal connected with the same general litigation as those previously decided in this court

with the same entitlement—Czarra v. Czarra, 124 Ill. App. 622, and Czarra v. Czarra, *ante*, p. 430. In this case the appeal is from an order of the chancellor in the Superior Court requiring the appellant to pay fifty dollars to the appellee for solicitor's fees to enable her to defend in this court the appeal No. 12,324, 124 Ill. App. 622, in which we have since affirmed the judgment. It is objected to this allowance, as it was to that which came under our notice in Czarra v. Czarra, *ante*, p. 430, first, that it is only during the existence of the marriage relation that the common law or the statute authorizes such an allowance; and, second, that such an allowance should not be made without a showing of the wife's inability, as was the case in this order, which recites that it was made without the hearing of testimony on the motion for it.

Our decision in this cause must be governed by that in Czarra v. Czarra, *ante*, p. 430, filed contemporaneously herewith. We regard this allowance as justifiable under the statutory power of the court, for the reasons therein stated—if indeed it does not come more precisely under the terms of the Act of 1874, in that the words “appeal and writ of error” may be held to mean such an appeal or writ of error from any decree of divorce or decree in a matter ancillary thereto.

The judgment of the Superior Court is affirmed.

Affirmed.

George H. Fergus et al. v. George C. Miln et al.

Gen. No. 12,738.

1. TRIAL—*power of trial judge to advance.* Under the statute, it is within the sound discretion of the trial judge to advance the trial of a cause, and his action in this regard will not be reversed unless an abuse of discretion is shown.

2. TRIAL—*when advancement of, not abuse of discretion.* Held,

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that in this case there was no abuse of discretion; and that the advancement would have been harmless to appellant even if erroneous.

Attachment proceeding. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

JOHN C. WILSON, for appellants.

EDWARD MAHER and GEORGE LAUDER TURNBULL, for appellees.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This appeal is from a judgment of the Circuit Court of Cook county dismissing the suit of appellants against the appellees at appellants' costs, for want of prosecution.

The appellants, who had sued appellees and attached real estate belonging to the appellee Louise Jordan Miln, the wife of the other appellee, George C. Miln, refused to proceed with the trial of the cause when it was called for trial. They contended that it should not then have been called, that it had been improperly advanced in contravention of the rules of court and without good cause, as required by the statute, and should be stricken from the calendar and continued. This furnishes their only ground of complaint in this court.

That plaintiff should, at the demand of defendants, on a notice of almost a month, be compelled to go to trial, about ten months after beginning a suit and almost five months after suing out an attachment and levying it on the property of a defendant who contended and had pleaded that she was not liable, jointly or otherwise, with the other defendants, does not on first impression present much of a grievance to us. Our impression is deepened rather than weakened by an investigation of the record. It is of course possi-

ble that a plaintiff, after beginning a suit, is at such disadvantage through the absence of material witnesses as to render delay in trial essential to his just treatment. But in this case the defendants admitted in open court that all and each of the witnesses, whose attendance the plaintiffs said on their motion for a continuance was necessary and desirable at the trial, would testify as the plaintiffs in their presented affidavit had claimed, and while a case may be imagined, as suggested by counsel for appellants, where such admission is not sufficient to render an immediate trial fair, because "the personal presence of the witness is fairly shown to be necessary to prevent surprise," this is not such a case.

As for the advancement of the suit so that it was tried in ten months instead of two years from its institution, had such advancement been error under the statute and the rules, it ought to be considered harmless error so far as the plaintiffs are concerned. The popular opinion concerning the result of crowded court dockets in Cook County must be reversed, if this is a grievance of theirs. Whatever harm could be done by such an error would be to subsequent suitors whose cases were postponed, not to the appellants. But the advancement was not error. The statute which the plaintiffs invoke says that all causes shall be tried in their order "unless the court for good and sufficient cause shall otherwise direct." Manifestly, this must leave the sufficiency of the cause to the sound discretion of the trial court; and so the Supreme Court says that it does. *Morrison v. Hedenberg*, 138 Ill. 25; *Staunton Coal Co. v. Menk*, 197 Ill. 373; *Crosby v. Kiest*, 135 Ill. 461.

The appellants, however, insist that this discretion was abused. We do not agree with them. It appeared that the defendant, Louise Jordan Miln, was a foreigner; that she was a resident of England and the

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mother of five children there residing; that one of them was ill and needed her attendance; that she was in this country looking after the settlement of her father's estate; that the attachment levied by plaintiffs on her interest therein tied up and arrested such settlement; that she was unable to give a bond to release the attachment; that in the ordinary course the suit to which she claimed she had a perfect defense would not be tried for another year. This state of things was ample cause for the action of the court.

The judgment of the Circuit Court is affirmed.

Affirmed.

Concord Apartment House Co. v. W. D. O'Brien et al.

Gen. No. 12,605.

1. **MECHANIC'S LIEN**—*when contract sufficient to support decree for.* Where the contract in question fixes with certainty the time for final completion of the work and payment of the money within the periods fixed by the statute, it is sufficient to support a lien.

2. **MECHANIC'S LIEN**—*when contract does not waive right to.* A provision in the contract of the general contractor by which he agrees to furnish, when requested, releases of claims for lien by third parties, does not affect the right of such general contractor to enforce a lien in his own behalf.

3. **MECHANIC'S LIEN**—*character of undertaking essential to waive.* In order to waive by contract the right to a mechanic's lien, there must be an express covenant or a covenant resulting by implication from the language used so plain that a mechanic can so understand without seeking a professional interpretation as to its legal effect.

4. **MECHANIC'S LIEN**—*when acceptance of security does not waive right to.* The acceptance by a contractor of security for payments maturing from time to time, does not affect his right to enforce his lien with respect to the balance subsequently accruing with respect to which he has accepted no security.

5. **ARCHITECT'S CERTIFICATE**—*how far binding.* Where after the work has been completed an accounting has been taken and an architect's certificate issued stating the balance due, the same, as to such balance, is binding upon the parties in the absence of fraud, accident or mistake, where the contract between the

parties made the architect the arbiter of disputes between the parties.

Intervening petition. Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

Statement by the Court. This proceeding is in the nature of an intervening petition grounded upon the answer as amended of appellees to the original petition for a mechanic's lien upon the land and building of appellant, filed June 11, 1896, by the Western Planning & Manufacturing Company, to which amended petition a demurrer was interposed by appellant and sustained by the Superior Court and the amended petition dismissed. An appeal from the order was prosecuted to this court by appellees and the action of the Superior Court in so sustaining the demurrer and dismissing the amended petition, this court on that appeal adjudged to be error, and the cause was remanded to the Superior Court for further proceedings. *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5. In this case there will be found a full and succinct statement of the averments of the amended petition to which we refer and adopt as the statement here, not deeming it necessary or expedient to again set it forth.

Upon a redocketing of the cause pursuant to the mandate of this court, appellant filed its answer September 5, 1903, which it subsequently amended February 20, 1905. In the answer as amended, appellant admits the contract with O'Brien of May 28, 1895, for \$8,500, under which appellees base their claim for a lien, but deny that O'Brien did any work under it, and aver that the contract expired by limitation September 15, 1895, and that thereafter on December 21, 1895, a verbal agreement was made with O'Brien to do the work specified in the former written contract for \$10,050, but that neither the time of completing the

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work nor for final payment was fixed by the verbal agreement, and that the verbal agreement was not in any sense an extension of the first contract or any of its provisions, or that the increase of \$1,500 in the price was compensation for loss O'Brien may have suffered by reason of his not having, to that time, entered upon the performance of the original contract. Denies O'Brien did any extra work or furnished extra material or that the work undertaken to be done by the verbal contract was fully performed to the satisfaction of Wheatley as superintendent, or that Wheatley issued a final certificate under the terms of the contract, or that anything is due O'Brien or Sedgwick, his assignee thereunder. Denies work was completed under verbal contract prior to September, 1896, and avers O'Brien never fully performed the work contemplated by the verbal contract. In *arguendo* states that if all conditions of contract of May 28, 1895, were part of subsequent verbal agreement, that then appellees had no right to a lien for work done, because under second paragraph article 8 of that contract, O'Brien stipulated to release any lien he might have upon request, and in the answer appellant demands that appellees forthwith execute and furnish appellant with an absolute release of all claims and liens and dismiss their intervening petition.

Appellant further claims that appellees are not entitled to any lien, because it avers that O'Brien received collateral security for a large portion of the contract price of the work done, by acceptances of W. P. Dickinson & Co. in favor of American Radiator Co. and the Holland Radiator Co. for materials, guaranty by Dickinson & Co. of an account with Crane Co. for materials, acceptance given the Illinois Malleable Iron Co. for materials, also that a number of orders given by O'Brien & Co. on Dickinson & Co., accepted by them, and garnishments on judgments against O'Brien paid by appellant and by Dickinson & Co.

Upon the issues thus joined the cause was referred to Master in Chancery Healy, who reported in favor of appellees' claim, and after overruling the exceptions of appellant to the master's report, a decree was entered establishing a mechanic's lien upon the property of appellant set out in the intervening petition for the sum of \$4,105 and costs of suit, to reverse which decree this appeal is prosecuted.

HELMER, MOULTON & WHITMAN, for appellant.

MARSTON & TUTTLE, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Having in view *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5, it only remains for this court to now determine whether the proof in the record, when tested by legal principles applicable to it, sustains the decree.

It is apparent that the written contract of May 28, 1895, between appellant and W. D. O'Brien, as enlarged by the following indorsement thereon in writing: "December 21, 1895. We hereby agree to pay said first party the additional sum of \$1,500, same being for increased cost of material to be used in the building." Signed, "The Concord Apartment House Company,

By CARL FINDELSEN, President,
A. A. ROLF, Secretary."

forms the contract by which the rights of the contestants here must be determined. This is patent from the fact that no further specification was made at the time of the indorsement above set forth. None was necessary under the conditions in which the parties then were. The failure of O'Brien to commence the construction of the building as provided by the original contract, resulted through no fault of his, but for the reason obvious from the proofs, that appellant was

without money to finance the enterprise. That the fault did not lay with O'Brien is evident from the further fact that appellant recognized that the cost of material had enhanced between May 28, 1895, and December 21, 1895, and for which \$1,500 was added to the contract price. The contract was thereby revived and remained in full force, with this difference only, that \$1,500 was added to the contract price. That writing was also in effect an admission that the delay in starting the building was not chargeable to O'Brien. Whether or not this delay may be accounted for by the uncontradicted testimony of the secretary of appellant, Rolf, that "*the company had no money except at one time \$500 received from the railroad company for assigning frontage on Indiana Avenue,*" is not necessary at this time for us to decide, but that the delay was caused by appellant is clear.

By article V of the contract it is provided that all work contemplated by the contract shall be done and completed on or before September 15, 1895, and by article VI all delays by the owner or superintendent or resulting from other causes without the fault of the contractor, the time for completion shall be extended for a period equivalent to the time so lost, and by article VII final payment, it is provided, shall be made within thirty days after completion of the work.

Time for final completion and payment is so certainly fixed by the contract as to fully comply with the essential statutory requirements preliminary to establishing a mechanic's lien.

The amount found due by the decree can be sustained under two conditions deducible from the evidence.

First. By the terms of the contract Wheatley, the architect, was constituted the final arbiter as to the amounts due O'Brien under the contract, and all such amounts were to be paid on his certificate. By article IX the final certificate of the architect was made binding and conclusive on all parties.

Second. There was an accounting made by O'Brien with Rolf, the secretary, and Wheatley, the architect of appellant, as to the amount due. In which accounting all the counter-claims of appellant, together with the amounts paid on account of the contract, were gone over and an adjustment made and the amount due O'Brien fixed at \$4,568, for which sum Wheatley issued to O'Brien a final certificate. Rolf also made and delivered to O'Brien the following certificate:

"CHICAGO, FEBRUARY 18, 1898.

This is to certify that a final certificate of \$4,568 was issued by the Concord Apartment House Company in favor of W. D. O'Brien, August 10, 1896.

A. A. ROLF, Secy."

No fraud or mistake is either charged or proven in the settling of the account or in the issuing of the certificate by Wheatley, the *bona fides* of no one concerned in bringing about this result is challenged. Appellees might well have rested their primal proof at this stage. They had made out at least a *prima facie* case which, if subject to attack, the *onus* of so doing devolved upon appellant. The rights of the parties, in the absence of fraud or mistake, must under the rulings of the courts in this state be determined by the architect's certificate.

As was said in *Arnold v. Bournique*, 144 Ill. 132, on page 139, "The decision of the architects reduced to writing and signed by them, was the substantial act which determined the rights of plaintiffs to the money and determined the obligation of the defendant to pay."

And in *Lull v. Korf*, 84 Ill. 225, the same legal effect was given to the architect's certificate and the owner was held to be estopped thereby to urge defects in the work. The architect's certificate was held conclusive, unless it be shown the certificate is the offspring of fraud or mistake "connected with the issuing or the obtaining of such certificate." Appellees went

farther and proved by Rolf, the secretary of appellant, every item entering into the certificate, and the fact of its having been made out and delivered by Wheatley to O'Brien. Rolf was personally cognizant of the facts and competent to testify. The certificate of Wheatley was lost. Proof of this fact, as also its contents, was made by Rolf. We find no evidence in the record in contradiction. Undisputed it is sufficient. Appellant has failed to prove that any of the orders, notes, acceptances and payments made and issued to material men for material furnished for the building to O'Brien were so done after the accounting or the issuing of the certificate by Wheatley, nor can we gather from the evidence that such is the fact. The record is likewise silent as to any payment having been made by either appellant or Dickinson upon the judgment of the American Radiator Company v. W. P. Dickinson for \$1,246.08, which judgment was for radiators put into the building of appellant by the American Radiator Company for O'Brien, which O'Brien was to supply under his contract with appellant. O'Brien, for aught the record shows to the contrary, is still liable to the American Radiator Company for the value of such radiators. No advantage has accrued to him by reason of the judgment against Dickinson, and it would be inequitable to charge this amount against the certificate. The *onus* of proving payment, in whole or in part of the Dickinson judgment, was on appellant.

It is also contended that under the contract O'Brien cannot maintain any action for a mechanic's lien and that the condition in the contract that O'Brien should furnish whenever requested a release from any liens or rights of liens, is a complete and effectual waiver of the right to a mechanic's lien. Such condition is not susceptible to this construction. All that was intended by this condition was to protect the property of appellant from all liens which might accrue to subcon-

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tractors, material men, mechanics or laborers, for work, labor or materials done or furnished to the property of appellant under the O'Brien contract, and was neither intended to, nor does the condition affect the right of O'Brien to a lien for work and materials furnished by him under his contract. The covenant of O'Brien was, in legal effect, to furnish upon request a release of the liens of third parties. Nor could any complaint be heeded of a failure to furnish such releases to appellant, if the failure of appellant to make payments at the times provided by the contract to the contractor O'Brien was the cause and only reason why O'Brien was unable to furnish releases of third parties at the time when any such releases were demanded; nor does the record in fact disclose any demand for releases other than contained in the answer, coupled with a demand that the intervening petition be dismissed. *Downey v. O'Donnell*, 92 Ill. 559.

The decisions cited in which liens were held to be waived are grounded upon the express covenant by the contractor in unequivocal terms waiving the lien. There is no such covenant found in the contract in question affecting the right of O'Brien to a lien. If the parties had so intended, they would have made it evident by their contract. To be effective, there must be an express covenant or a covenant resulting by implication from the language used, so plain that a mechanic could so understand without seeking a professional interpretation as to its legal effect. *Nice v. Walker*, 153 Pa. St. 123.

Admitting that the taking of security for payments due under a building contract operates as a waiver of a statutory lien and is effective to discharge such lien of the recipient of such other security, and conceding that the record discloses that O'Brien took many such securities in the nature of guaranties, checks, notes and moneys from W. P. Dickinson & Co., a third party, who in fact undertook to finance the building project

by disposing of \$150,000 of bonds issued by appellant, and that so far as these securities extended to pay sums due under the contract, the right to a statutory lien was discharged as to those sums; yet the right of O'Brien to a mechanic's lien for the amount due on the final certificate of the architect Wheatley remains unaffected, in the absence of any claim or proof that such other securities or payments were made or received for or on account of the amount certified by Wheatley to be due O'Brien under the contract in the final certificate issued by him to O'Brien. Furthermore, Dickinson cannot be regarded as a third party in his dealings with O'Brien. He was the agent of appellant and all payments made and orders given by him were as such agent for appellant. Whatever O'Brien took or received from Dickinson on account of moneys due under his contract with appellant must, on the evidential facts undisputed on this record, be treated as the property of and coming from appellant, and therefore such acceptance by O'Brien cannot be regarded or treated as a waiver by him of his right to a lien. *Kendall v. Fader*, 199 Ill. 294, is decisive on this point.

Reference has been made to the fact that Rolf, while secretary of appellant, acted as the legal adviser of O'Brien in the initiatory steps leading to the filing of the intervening petition and that he advised him to preserve his rights to a lien, and that O'Brien acted under such advice in the steps which he subsequently took in an attempt to conserve and protect his rights in the premises. No bad faith is imputed to Rolf in what he did for O'Brien. He was cognizant of the legal status of appellant and O'Brien under the contract. As secretary of appellant he kept the accounts and from his books and memoranda was able to make up a correct account impartially between the parties and one that all concerned might in the exercise of good judgment be treated as trustworthy and reliable.

Both appellant and appellees have, by calling Rolf as their witness, impliedly certified to his credibility and reliability, and we find nothing in his testimony or actions warranting our disregarding such implied representation.

There is no merit in appellant's resistance of O'Brien's claim. O'Brien, as the record shows, lived up to his contract as best he could, struggling and striving continually against the failure by appellant to make payments due him under the contract as the work progressed. This failure constantly embarrassed O'Brien, put him in financial straits with his creditors and finally compelled him to assign his rights under the contract to Sedgwick for the benefit of those having claims against him arising out of the construction of appellant's building, all of which was occasioned by the improvident managers of appellant company launching upon an extended building enterprise without any cash capital or resources.

Most of the defenses interposed are of an extremely technical legal character and are unavailing to defeat appellees' claim as against the strong evidential facts appearing in the record of O'Brien's having satisfactorily performed his part of the contract in accordance with its terms and complied with all the formal requirements of the statute necessary to preserve his right to a mechanic's lien.

After a painstaking consideration of all the questions raised in the record and briefs in this case, we are unable to discover any error justifying a reversal of the decree of the Superior Court, and the decree will therefore be affirmed.

Affirmed.

**Charles W. Rigdon v. Estate of William W. Strong,
deceased.****Gen. No. 12,606.**

1. **REAL ESTATE COMMISSIONS—*abandonment destroys right to.*** A real estate broker who abandons his effort to consummate a sale thereby loses his right to commissions upon a sale finally made by the owner.

2. **REAL ESTATE COMMISSIONS—*who entitled to, as between several claimants.*** In the absence of agreement to the contrary, two or more brokers may be employed by the owner at the same time to make a sale, and, in that contingency, the broker who is the efficient cause of bringing about the sale is the one entitled to the commissions, notwithstanding another broker may have called the purchaser's attention to the property.

Contested claim in court of probate. Appeal from the Circuit Court of Cook county; the HON. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

WOOD, FYFFE & ADCOCK, for appellant; COLIN C. H. FYFFE and EDMUND D. ADCOCK, of counsel.

BULKLEY, GRAY & MORE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is a claim originally filed in the Probate Court of this county against the estate of William W. Strong, deceased, by appellant, Charles W. Rigdon, for \$10,625, claimed to be due him as a real estate commission for being instrumental in procuring the sale of the Owings Building in Chicago to Cyrus H. McCormick for the consideration of \$425,000.

A trial was had in the Probate Court resulting in a finding against Rigdon and a disallowance and a dismissal of his claim. Rigdon perfected an appeal from this judgment and finding of the Probate Court to the Circuit Court, where by agreement the cause was

tried before the court without a jury upon the evidence given and heard on the trial in the Probate Court.

The Circuit Court also disallowed the claim and gave judgment against Rigdon for costs. In an endeavor to reverse the finding and judgment of the Circuit Court Rigdon prosecutes this appeal.

Appellant's counsel state the question before the court on this appeal to be: "Whether there is in the record any evidence to prove a liability on the part of Strong growing out of the purchase of the property known as the 'Owings building' by Cyrus H. McCormick." We are content to ground our decision on a solution of this question.

The proof of Rigdon rests upon the testimony of Fetzer and Peters. Strong having died, Rigdon was disqualified from testifying upon the trial, so that the facts within the knowledge of the interested parties cannot be gleaned from them. Fetzer testifies that he was agent in charge of the real estate business of Cyrus H. McCormick, that Rigdon first called his attention to the Owings building, although many real estate men had talked with him about it. Rigdon went over the building with Fetzer so that Fetzer, as he states, might "see the character of its construction, the lay of the offices and the things of that kind, to impress upon my mind the rental value of it, from which we expect to get our returns." R. p. 34. This was in the fall of 1897. Fetzer thereupon took the matter up with McCormick and with Butler, McCormick's business manager. Fetzer went with Rigdon once to call upon Strong, but did not find him. Fetzer made several offers to Rigdon, none of which was accepted. Fetzer's talks with Rigdon were between the fall and the month of December, 1897, after which time Fetzer did not know of Rigdon's doing anything in the matter. This is the substance of Fetzer's testimony. The conveyance by Strong and his wife of the Owings building was made by deed dated March 8, 1898. The sale was actually consummated by the witness Ed-

ward H. Peters, who was connected in so doing with Fetzner.

Peters testified that when he saw Strong about a sale to McCormick he said, "that deal belonged to Mr. Rigdon with the McCormicks, and that if the McCormicks bought the property he would have to protect Mr. Rigdon in the commission." The date of this conversation Peters fixes as January, 1898. On cross-examination Peters testifies: "I negotiated the sale of this property for Mr. Strong with Mr. Fetzner and was paid a commission for it. I was engaged in that off and on from early in January until the sale went through. I went back and forth between Fetzner and Strong a great many times with reference to details." (A. p. 11.) It will be seen from the foregoing that the record is barren of any evidence of any actual dealings between Rigdon and Strong in relation to this property, or anything else, or of any offers made by McCormick or Fetzner, his agent, which were by Rigdon communicated to Strong, and the whole of Rigdon's case virtually rests for its support in the statement which Peters testified Strong made to him about protecting Rigdon's right to a commission in the event of a sale to McCormick. This falls short of containing elements sufficient to sustain even an implication of a contract of employment by Strong of Rigdon to negotiate a sale of the Owings building to McCormick for \$425,000 or any other sum, either in cash or real estate or partly in both.

The status of the relations between Strong and Rigdon at the time Peters called upon Strong when he made the statement attributed to him by Peters in relation to payment of commissions to Rigdon, does not appear; neither does it appear that Rigdon ever made an offer of any character to Strong on behalf of McCormick for the property at any time. If Rigdon was engaged in negotiating a sale prior to January, 1898, the record is silent as to any cause or reason why

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he discontinued further effort in an endeavor to consummate a sale.

Giving to the statement of McCormick to Peters as liberal an interpretation of which the language used is susceptible, the subsequent actions of Peters and Strong in relation to the property, the negotiation of its sale claimed to have been made by Peters through his efforts, he acting also as the intermediary between Fetzer and Strong, his claim to the commission on the sale, and its payment to him by Strong, renders the evidence of Peters, when taken together, in all its parts, contradictory of and overcoming any presumption which can be said to arise from the bare and unexplained statement made by Strong in January, to the effect that the commission on any sale made to the McCormicks would belong to Rigdon. This evidence utterly fails to show that Rigdon was the efficient procuring cause of the sale to McCormick. That Peters, after Rigdon had abandoned any further action in the matter, prosecuted negotiations for a sale between Strong and McCormick and brought them to a successful culmination, is abundantly proven by Peters' evidence given at the instance of Rigdon, and is conclusive against the claim now made by Rigdon. Rigdon has failed, first, to prove any contract of employment by Strong to sell the Owings building, and second, that he ever produced a buyer ready and willing to make the purchase upon terms acceptable to Strong. *Lawrence v. Rhodes*, 188 Ill. 96.

Whether Rigdon was a volunteer in his interviews with Fetzer or not, it is evident from his inaction that he abandoned further effort more than two months prior to the consummation of the sale by Peters. Strong, even if a contract of agency had been proven with Rigdon, had a right after abandonment by Rigdon to continue negotiations for a sale through other persons. *Davis v. Gassette*, 30 Ill. App. 41.

In the absence of an agreement to the contrary, two or more brokers may be employed at the same time by

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the real estate owner to make a sale, and in that contingency the broker who is the efficient cause of bringing about the sale is the one entitled to the commission, notwithstanding another broker may have called the purchaser's attention to the property. *McGuire v. Carlson*, 61 Ill. App. 295.

Conceding that Rigdon and Peters were each engaged in finding a purchaser for the property, and Rigdon caused the same to be brought to the attention of McCormick in the first instance, but that Peters thereafter was the sole procuring cause of the sale and his efforts alone resulted in its consummation, it is the law under such circumstances that Peters was entitled to the commission, and having got it from Strong in his lifetime, Strong discharged the full measure of his obligation, and his estate, now he is dead, cannot be held liable to pay another commission to Rigdon.

If Strong in his lifetime, in a former trial, gave evidence which Rigdon regarded as favorable to his claim, before he can avail himself of any advantage which might arise out of it, he should have adopted it by putting it in his proof and making it a part of the record; but he elected not to do so, and we have no right to go outside of the record to determine what effect it might have had upon his claim.

It is elementary that a defendant is only put to it to meet the evidence adduced on the trial by the plaintiff, and if such evidence falls short of establishing a right to recover, the defendant may rest in the security of its infirmity and demand the judgment of the court in his favor without resorting to his proofs.

On the evidence in this record, with all the natural and fair inferences deducible from it, appellant is not entitled to maintain his claim against the estate of appellee for commission, and the judgment of the Circuit Court disallowing the claim with costs is affirmed.

Affirmed.

Joseph A. Moore v. John West et al.

Gen. No. 12,618.

1. *ASSESSMENT OF DAMAGES—when record sufficient to review order of, upon dissolution of injunction.* A partial record containing all the orders, etc., pertaining to the order appealed from, awarding damages upon the dissolution, is sufficient to enable the court to review the propriety of such order.

2. *ASSESSMENT OF DAMAGES—to whom award should be made upon dissolution of injunction.* Upon dissolving an injunction and assessing damages, the award of damages should be in favor of the party to the record who has suffered the damages; but where the security given upon the issuing of the injunction is in the form of cash deposited with the court, the court has the power to provide for the distribution of the money so within its control to the parties ultimately entitled to receive the same.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906. Rehearing denied October 18, 1906.

J. EDWIN REEVES and BLUM & BLUM, for appellant.

SIMON LA GROU, J. C. FARWELL and G. G. BARRY, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from an order assessing damages upon the dissolution of an injunction for wrongfully suing out the same.

The record is not a complete, but a partial record only, consisting of the orders dissolving the injunction, granting leave to file a suggestion of damages, assessing damages and allowing the appeal and a copy of the appeal bond.

Two motions have been filed here. That by appellees for an order dismissing the appeal for want of a

sufficient record, and the other by appellant suggesting a diminution of the record and asking for a writ of *certiorari* commanding the clerk of the Circuit Court to send to this court a true transcript of the record and proceedings in this cause in that court. The decision of both these motions has been, by order, reserved to the hearing of this appeal.

The rule laid down in *O'Kane v. West End Dry Goods Store*, 79 Ill. App. 191, that errors may be assigned on a partial record and passed upon by the court, if the record is sufficient for that purpose, governs this case. Upon looking into the record we find it is sufficient to give this court jurisdiction to examine and pass upon the errors assigned upon the order assessing damages for the wrongful suing out of the dissolved injunction, and the motion of appellees to dismiss will therefore be denied.

Appellant's suggestion of diminution of the record and motion for a writ of *certiorari* to the clerk of the Circuit Court to certify a true record of the proceedings in the Circuit Court comes too late, not having been made until after the second day of the term of this court to which this appeal is brought. In *Railroad Co. v. Gay*, 5 Ill. App. 393, the facts are akin to those in this case. The record contained copy of the decree and appeal bond and was filed in apt time. A motion was made similar to the motion of appellant here. That motion was denied, the court saying: "The application must be made to the court before the time allowed by the statute has expired." The authorities are uniform to this effect. The motion of appellant is also denied.

The only assignment of error in this record which we are clothed with jurisdiction to review, is the seventh, that the court ordered the clerk of the court to pay the solicitors of appellees the sum of three hundred and fifty dollars assessed as damages.

On reading the decree we find—after the formal rec-

itations that the injunction had been dissolved, etc.,—this: “The court having considered the evidence of the respective parties with reference to said damages finds, that the said defendants for the necessary services of their solicitors, in procuring the dissolution of said injunction, have suffered damages to the extent of three hundred and fifty dollars, by reason of the premises, and that said sum is a reasonable and usual compensation for said services, and the court by virtue of the power in it vested by the statutes of this state, doth order, adjudge and decree that said damages be assessed at the sum of three hundred and fifty dollars, and the same are so assessed. It is further ordered, adjudged and decreed that the clerk of said court pay the solicitors for said defendants * * * the said sum of three hundred and fifty dollars from the money in his hands which was deposited by complainant in lieu of a bond at the time of the issue of the injunction.”

If this decree was susceptible to the interpretation claimed for it by appellant, that it is a decree in favor of one not a party to the suit and an award of damages to the solicitors and not to the client, we should regard the assignment of error on this branch of the case as well taken, for it is the law conclusively settled in this state that no award of damages on the dissolution of an injunction can be made to strangers to the suit nor to solicitors who are not parties. *Rice v. Goldberg*, 26 Ill. App. 603.

But in the view we take of this decree it is not subject to any such infirmity. The damages awarded are to the defendants in the bill in which the injunction was issued and afterwards dissolved, and in this regard the direction of the statute was complied with. That part of the decree ordering the clerk to pay the amount of the damages assessed to appellees, to their solicitors, was directory only. The solicitors had the power to collect the damages and satisfy the record without

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any such direction. This case was unusual. In the place of an injunction bond directed to be given by the statute, appellant deposited a sum of money with the clerk of the court, which money was held in lieu of such statutory bond, to be paid out in accordance with the judgment of the court. It was a fund in court to be held by the clerk for a specific purpose, viz., to pay any damages which appellees might suffer by reason of the wrongful suing out of the injunction. The money was within the control of the court, whose duty it was to direct its distribution. While it might have been more in accord with precedent to have directed the money assessed as damages to be paid by the clerk "to the defendants or their solicitors," the practical and logical effect of the decree was to the same purport.

There is no force in the objection that the assessment of damages was premature.

We find no reversible error in the record, as presented, and the decree of the Circuit Court is affirmed.

Affirmed.

George H. Lally v. The New Voice.

Gen No. 12,698.

1. TENANCY FROM YEAR TO YEAR—*when does not exist.* Where the holdover by the tenant is with the knowledge, consent and acquiescence of the landlord, a tenancy from year to year does not exist.

2. INSTRUCTIONS—*estoppel to complain of errors in.* A party cannot complain of errors in instructions which have been induced by himself.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

GEORGE W. WILBUR, for appellant.

PECKHAM, SMITH, PACKARD & AP MADOC, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Appellant sued appellee for five months' rent of premises numbers 325 and 327 Fifty-fifth street, Chicago, before a justice of the peace of Cook county and there obtained a judgment for \$175, the amount claimed, from which appellee perfected an appeal to the Circuit Court, where, upon trial, the jury rendered a verdict in favor of appellee, upon which the court entered a judgment, in an endeavor to reverse which this appeal is prosecuted.

The evidence tends to establish that appellee, a tenant of appellant under a lease for one year ending April 30, 1903, was approached by the agent of the landlord in the month of February preceding the end of this term, with a request to execute a new lease for an additional year. Wooley, the president of appellee, told the agent that his company had bought a place into which they expected to move May first if the occupant vacated by that time. If possession was not surrendered, his company would take a lease from month to month at the same monthly rental and remain as such tenant until such time as possession of its own property was obtained. This the agent declined to accede to, saying he must put up "To Rent" signs, which he did, with the consent of Wooley. There is a conflict in the testimony as to when the "To Rent" signs were taken down. Appellant contends they were taken down about April 20, 1903, while the witness Blake, an employe of appellee at the time, testifies they were taken down June 8, 1903. Of that he says he is positive, because he made a memorandum of the fact at the time. On September 23, 1903, appellee gave written notice to appellant that it would vacate the premises on or before November 1, 1903. Appellee did vacate, at the

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end of October, paying rent to and including the month of November at the same rate as under the lease.

We are of the opinion that the verdict is clearly sustained by the evidence. There is nothing in the evidence about any claim made by appellant that if appellee held over it would be regarded as a tenant for another year. The fact of the "To Rent" signs being put up by appellant with the consent of appellee, following appellee's refusal to enter into a lease for another year, inhibits any implication of a lease for an additional year being intended by the parties, and the fact that appellee made known its intention of removing to its own premises, which it had then lately acquired, is wholly inconsistent with the theory now advanced by appellant, of a tenancy being created for another year, either expressly or by implication. Appellee in no view of the evidence can be treated as a tenant holding over after the expiration of the year term and becoming thereby a tenant at the will of the landlord. The holding over here was with the knowledge and consent of the landlord, under conditions made known at the time, in which appellant acquiesced. The tenancy created by the conditions arising upon the actions of the parties, before and since April 30, 1903, is a monthly tenancy, with an express agreement on the part of appellee to vacate at any time on appellant's procuring another tenant. There is no attempt here to rebut the presumption arising from the holding over by any claim that the intent of the tenant was to the contrary. The terms of the tenancy are fixed alike by the actions of the landlord and the tenant, and it is too late for appellant to recede from the terms of the contract which his dealings with appellee impose upon him.

We do not call in question or challenge the legal principles announced in *Chicago Theological Seminary v. Chicago Veneer Co.*, 94 Ill. App. 492, but we

hold that the facts of this case do not fall within the ruling there announced.

This case is by analogy within the ruling of *Peck v. Christman*, 94 Ill. App. 435. There the landlord was held, after once exercising his right of election, to be estopped to change or shift his position. Slight acts on the part of the landlord will be construed as constituting an election. So here appellant had the legal right to treat appellee as a tenant for another term or as a trespasser. He did neither. He advertised the premises for rent for more than a month after his right of election had accrued. By his acts he accepted the terms of continued occupancy proffered by appellee. To hold to the contrary would do violence to the words and actions of both the parties.

Appellant tendered an instruction—which the court gave—in which certain dates were misrecited. While reading the instruction the court discovered the mistake and corrected it, with the consent of counsel for appellant. The error was in reference to the date of the termination of the lease, which was “the 30th day of April, 1903.” It was originally written “1904.” Rent sought to be recovered was for the months of December 1903, and January, February, March and April, 1904. The court erroneously changed the years 1903 and 1904 to 1902 and 1903. Counsel for appellant stood by without any protest or suggestion and allowed the error to be made without objection. The difficulty presented was of appellant’s own creation. His silence must be construed as acquiescence. He is estopped to now complain of errors of which he was the author. On the other hand, yielding the point in favor of appellant, can it be said the error worked him any injury? There was no dispute in relation to the months for which rent was claimed. It was admitted that all rent had been paid to and including the month of November, 1903. The concluding clause of this instruction directed the jury’s attention to the leasing in

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dispute. This plainly appears from the language used, which is, "Then your verdict should be for the plaintiff for the amount that remains unpaid under the terms of a lease terminating on the 30th day of April, 1904." By this the jury could not be deceived. They were evidently not misled to the prejudice of appellant. It is harmless error and such that has been repeatedly held insufficient to authorize the reversal of a judgment, the record of which is otherwise free from error.

The judgment of the Circuit Court is affirmed.

Affirmed.

FitzAllan Woodbury v. H. H. Ryel, Executor.

Gen. No. 12,699.

1. FORCIBLE ENTRY AND DETAINER—*what issue involved in.* In an action of forcible entry and detainer the whole question is, does the defendant unlawfully withhold possession of the premises sought to be recovered in the action.

2. FORCIBLE ENTRY AND DETAINER—*estoppel to enforce judgment in.* Receipt of rent covering a period of time subsequent to the entry of the judgment, operates to restore the relationship of landlord and tenant and to estop the plaintiff in the action from enforcing the judgment rendered therein.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

W. H. RICHARDSON, for appellant.

PECKHAM, SMITH, PACKARD & ARMADOC, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court in an action of forcible detainer tried in that

court on an appeal from a like judgment of a justice of the peace. Both the justice and Circuit Court judgments are in favor of appellee. To reverse the Circuit Court judgment this appeal is prosecuted.

The facts show that Woodbury entered premises involved as tenant under a written lease from appellee for a term commencing August 1, 1904, and ending April 30, 1905, at the monthly rental of \$32.50, and that on February 27, 1905, appellee recovered a judgment in an action of forcible detainer against appellant for possession and that no writ of restitution was ever executed on this judgment, though one was issued. Appellant continued in possession, notwithstanding the judgment, and on March 10, 1905, paid rent at the rate stipulated in the lease, including the month of February, and \$6 on March rent. This was the last rent paid. On April 8, 1905, appellee caused a five days' notice to be served upon appellant claiming \$59 due as rent and notifying appellant that unless the same was paid on the thirteenth day of that month the lease would be terminated. A complaint in forcible detainer in the usual form was on May 3, 1905, filed before the justice on the expressed ground "that the lease expired April 30, 1905."

The contentions of appellant are that the first forcible detainer judgment terminated the written lease, and second, that there is a variance between the notice and complaint which, under the proofs, does not warrant a recovery in the present case.

The whole question in actions of this nature is, does the defendant unlawfully withhold possession of the premises sought to be recovered in the action? The lease under which a defendant may have entered, sheds no light on the question whether at the time of commencing the forcible detainer action he was wrongfully withholding possession. If appellant was wrongfully withholding possession on February 27, 1905, when the first judgment was obtained, that fact does

not of itself refute the charge that on May third following he was still wrongfully withholding possession. It is evident from the actions of the parties that they intended to disregard the first forcible detainer proceedings and restore their previous status as landlord and tenant and revive the lease. This conclusion finds ample warrant by the payment by appellant and acceptance by appellee of rent due in accordance with the rate fixed by the lease on March tenth following. Receipt of rent, covering a period of time subsequent to the entry of the judgment, undoubtedly operated to restore the relationship of landlord and tenant and to estop an enforcement of that judgment by dispossessing appellant under a writ of restitution in that case, so that at the time of instituting this suit it is obvious that the parties sustained to each other the relation of landlord and tenant. The complaint complies with the statute, section 5, chapter 57, and is sufficient. *Martens v. Fields*, 17 Ill. App. 483. It was unnecessary to state the circumstances of the entry, and the words "whose lease of said premises expired April 30, 1905," may be disregarded as surplusage. Under the rulings in *Harms v. Stier*, 70 Ill. App. 213, all that was incumbent upon appellee was to make proof of such facts as, under either one of the six subdivisions of section 2, chapter 57, R. S., constitute a wrongful withholding of possession. If appellant's original lease had expired—as he claims—his continued possession thereafter was wrongful. If he was indebted in the sum of \$59 for unpaid rent, at the time of service of the five days' notice, then his possession was wrongful after April thirteenth, the time limited in the notice for its payment.

We are unable to discover any reversible error in this record, and the judgment of the Circuit Court is affirmed.

Affirmed.

Chicago City Railway Company v. Jole E. Shreve.

Gen. No. 12,704.

1. **PASSENGER—*duty of carrier to.*** A carrier owes to its passengers the duty of doing all that human care, vigilance and foresight can reasonably do under the circumstances, and the mode of conveyance used and the duty of the carrier in this respect is not discharged until the passenger has safely alighted from the car.

2. **PASSENGER—*when carrier liable for injury to.*** A carrier is liable to a passenger injured in a collision at a point of danger, where it has failed to take all measures necessary to guard against accidents of such a character.

3. **MEDICAL EXPERT—*as to what not competent.*** A medical expert, as distinguished from an attending physician, is not qualified to give evidence with respect to subjective symptoms.

4. **INSTRUCTIONS—*how to be construed.*** All of the instructions given are to be considered as a series and construed together.

5. **VERDICT—*when not excessive.*** A verdict for \$2,500 is not excessive, where the evidence shows a partial paralysis resulting from the accident in question.

6. **PHYSICAL EXAMINATION—*offer to permit, not improper to be made in jury's presence.*** Held, that under the circumstances occurring at the trial of this case, it was not improper for plaintiff's counsel to offer to submit the plaintiff to a physical examination by physicians selected by the court.

7. **WITNESS—*money paid to, in excess of statutory fees, may be shown.*** It is proper in order to affect the credibility of a witness, to show that money in excess of the fees allowed by statute has been paid to him.

8. **JUROR—*what does not show prejudice of.*** The fact that a juror has asked questions of a witness and indicated a possible disbelief of the witness, does not show such a prejudice as to entitle the party calling such witness to withdraw a juror.

9. **ARGUMENTS OF COUNSEL—*strong denunciation not necessarily improper.*** The use of strong denunciatory language is not improper where it is sustained by that which the evidence tends to establish.

10. **CONDUCT OF COUNSEL—*when cannot be complained of.*** Conduct of counsel induced by the action of the counsel of the complaining party cannot be made the subject of just complaint.

11. **JURY—*when manner of polling, not ground for reversal.*** The manner of polling a jury is not ground for reversal when

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the answer of each juror clearly showed that the verdict was, when signed, and was, likewise, at the time of polling, the verdict of such juror.

12. JURY—*when confinement of, for twenty hours, not ground for reversal.* In a case which was on hearing for ten days and in which the evidence was conflicting, a confinement of the jury for twenty hours does not constitute an abuse of the power of the trial judge.

Action of trespass on the case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

Statement by the Court. This is an action of trespass on the case for personal injuries claimed to have been suffered by appellee through the negligence of appellant while a passenger on its cars in Chicago, August 19, 1901.

The declaration with customary particularity, avers the ownership and operation by appellant, on the day of the accident, of the street railway and the cars running thereon north and south of the point where the accident is alleged to have occurred on Clark street, Chicago, and that it was at that time a common carrier, and that appellee being in the exercise of ordinary care for her own safety, and while such passenger on said car, in the vicinity of Fourteenth street, appellant through its servants in charge of said car so recklessly and improperly ran, managed and operated said car that, as a result and in consequence thereof, said car, thereby then and there ran into and collided with a certain wagon then upon said railway track, whereby appellee was thrown violently against the car and her left arm and shoulder were seriously and permanently injured externally and internally and divers bones of her body sprained, dislocated and broken, and that she sustained serious and permanent injury to her spine and nervous system, and as a result of such injuries she became partially paralyzed,

crippled, sick, etc., and from thence hitherto has suffered pain, been hindered and prevented from transacting her usual business and affairs and necessarily expended money in an endeavor to be cured of such injuries so contracted, and laying her damages at \$15,000.

An additional count by leave of court was filed January 13, 1903, in which the averments of the original count are substantially set forth, with the additional averment in the nature of a claim for special damage that at the time of the injury appellee was proprietress of and conducting a dressmaking establishment from which she derived a profit of twenty dollars per week.

A second additional count was, by like leave, filed January 28, 1903, in which the place of the accident and its environment is more specifically and minutely described and set forth. Among others is the following averment: "That there was between Thirteenth and Fourteenth streets a certain high wall running parallel with and but a few feet west of said south-bound track, and that there was a certain opening in said wall which connected with a certain planked roadway leading from said Clark street through said opening westward to a certain freight or dock house, and that long prior to and at the time and place in question said opening and roadway were used by teams and wagons in going from Clark street to or near said freight or dock house and from and near said freight or dock house to Clark street, and in each case they were required to cross defendant's south-bound track and that by reason of the height of said wall and of the proximity of defendant's south-bound track thereto, its servants in charge of its south-bound cars were unable to discover teams or wagons being driven eastward along said roadway toward and through said opening into Clark street until such teams and wagons were almost upon the track upon which said south-

bound cars were running, which made said crossing a dangerous place, where collisions between defendant's south-bound cars have and were likely to occur," etc.; which condition, it is contended, was or ought to have been known to appellant by the exercise of due care, and that thereby the law imposed a duty upon appellant either to maintain a flagman or install some mechanical device, by means of which notice to those operating south-bound cars might be given of the approach of teams and wagons driving eastward toward said opening in time to avoid collisions, etc.; averring appellant's neglect either to maintain a flagman or any device at said point to avert the risks of collisions thus apparent. That on the occasion in question and in consequence of the absence of such necessary precautions and the negligence thus imputable to appellant, the servants of appellant in charge of said car did not learn of the approach of the colliding team and truck in time to avoid the impact which followed, resulting in the injuries to appellee for which she seeks compensation in this action.

The general issue was interposed to the declaration as thus constituted. Three times the case has been on trial before court and jury, twice the jury disagreed, the third time appellant was found guilty and a verdict rendered assessing appellee's damages at the sum of \$2,500. After overruling a motion for a new trial and denying a motion in arrest of judgment, made by appellant, the trial court entered a judgment upon the verdict, in an attempt to reverse which this appeal is prosecuted and forty-three assignments of error appear upon the record.

WILLIAM J. HYNES, JAMES W. DUNCAN and C. LeROY BROWN, for appellant; MASON B. STARRING, of counsel.

JAMES C. McSHANE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

We deem it unnecessary, as serving no good purpose, to review all the numerous assignments of error alleged upon this record, and in this opinion will confine the exposition of our views within the lines of law and fact which must control our decision.

Appellee being a passenger upon the car of appellant, it owed her the duty under the law to do all that human care, vigilance and foresight could reasonably do under the circumstances and the mode of conveyance in use to carry her in safety, and its duty in this regard was not discharged until she had safely alighted from the car, providing always that she was in the exercise of ordinary care for her own safety and that no negligent act of hers contributed proximately to the injury complained of. *Frink v. Potter*, 17 Ill. 406; *Chicago City Ry. Co. v. Morse*, 98 Ill. App. 662, affirmed in 197 Ill. 327; *Kane v. Cicero & Proviso Elec. Ry. Co.*, 100 Ill. App. 181.

This was the measure of appellant's duty. Was it negligently regardless of any act encompassed within such duty, which constituted the proximate cause of the accident in which appellee claims to have been injured? In order to determine the duty of appellant, the conditions environing the place of the accident at, and prior to the time of its happening, must be examined. It is charged in the declaration and demonstrated by the proofs unchallenged, that appellant for many years prior to August 19, 1901, the day of the accident, had controlled and operated an electric line of street cars running north and south on Clark street in Chicago; that the west rail of its south-bound track between Thirteenth and Fourteenth streets was within two or three feet of a high brick wall which separated Clark street from the tracks of the Lake Shore & Michigan Southern and other railroads; that to the west of these tracks was an arm of the Chicago river used

as docks for water craft engaged in navigating the Great Lakes, where cargoes were landed, and that in this separating wall was a break or opening at the point of the accident, the road leading through this break to and from the docks to the west being planked. There was a sliding gate at the opening, which appellant contends was closed and across which was a sign to the effect that the entrance was for "Fire Engines only;" but appellee contends that on the contrary the gate was seldom closed and across it there was no notice. Through this opening teams and wagons were constantly driven, carrying loads to and from the vessels docked at the west of the railroad tracks.

The motorman in charge of the car admittedly passed and repassed this point, motoring a car, daily for several years prior to the occurrence in dispute. If this opening in the wall was constantly used as the entrance of a roadway to the docks to the west of the railroad tracks by teams and wagons there, from the fact that the tracks used by the south-bound cars were so close to this wall and opening, that it was impossible for a motorman to discern any vehicular traffic emerging from such opening in the wall, until the horses' heads were exposed to view by passing through that opening, it is plainly evident that it was a highly dangerous place, exposed, unprotected and unguarded to accidents happening by cars coming into collision with vehicles passing out of such opening and crossing appellant's tracks on their way from the docks to the highway in Clark street, and this condition, if it existed as claimed, cast upon appellant in the exercise of ordinary care in the operation of its south-bound cars, the duty of using some practicable measure to guard against the dangers thus apparent and of the existence of which it had actual or constructive notice. On the other hand, if the opening was closed with a sliding gate, which was kept closed, and had a warning notice restricting its use for the passage of "Fire

Engines only," and the opening and roadway west of it was not in general use for vehicular traffic, then the duty of appellant would be restricted in accordance with the apparent necessities of the condition thus presented.

The evidence in the record, credible and unchallenged, justified the jury in concluding that the contentions of appellee were established, that the road from the opening west was planked, that the vessels at the dock were reached by teams and wagons as testified by several teamsters who constantly drove their loaded vehicles through that opening, some day by day, and while so doing saw others likewise engaged. Such had been the errand of the colliding wagon at the time of the accident in controversy, the driver of which had many times before made the same journey with like equipment. The testimony of the motorman that he never saw a team with a wagon driven through that opening, is lame and impotent in the light of the affirmative testimony of eye-witnesses and participants to the contrary. The evidence of appellant's witness, the yardmaster of the Lake Shore & Michigan Southern Railroad, instead of contradicting, tends to support appellee's witnesses on this point, for while it is true he testified he did not see any regular teaming there, yet he admits he had seen grocery wagons driven in over the road through the opening, delivering goods to boats at the docks, and that he knew other vehicles than "fire engines" passed through that opening in the wall.

The ignorance of the motorman though long continued, as to the dangers apparent and surrounding the place of collision, cannot relieve appellant from its duty to protect the point of danger in the operation of its cars or free it from its responsibility to answer in damages for injuries occasioned by its neglect of this duty; neither can liability be avoided under the claim that appellant could not practically operate

its cars if the speed of its cars were slackened at this point, for if the force of this contention were conceded, it does not follow that it would be necessary for the speed of every car to be slackened, but only such cars as were approaching in the alignment of the opening at the time when traffic was seeking to cross the tracks of appellant. A watchman or some mechanical device could be provided to give notice in time to ward off danger. The contention is impotent as an excuse, for the law regards life and limb more highly than mere cost of operation, and besides, there is nothing in this record from which this court can say that protecting this point from the dangers there apparently imminent, could not be done with due regard to the practical operation of appellant's cars.

We are satisfied from the evidence that the point of collision between the car of appellant and the wagon coming out of the opening in that wall was a point of danger, notice of which is chargeable to appellant, and consequently the duty rested upon appellant to take all measures necessary to guard that point against accidents from collision. Appellant was derelict in failing to take any precaution whatever to prevent collisions of its south-bound cars at this point with teams and wagons emerging through the opening in the wall, and such dereliction was negligence.

We hold that the averments of the declaration are sufficient to impute negligence to appellant in not protecting the place of the occurrence of the accident in question from the apparent danger of collisions to which, unprotected, it was exposed. *Jennings v. Chicago City Ry.*, 157 Ill. 274; *Chicago & Grand Trunk Ry. v. Carroll*, 189 Ill. 273; *West Chicago Street Ry. v. Petters*, 196 Ill. 298.

While there is much room for doubt as to the extent of appellee's injuries, there is no question but that she was a passenger upon the car at the time of the accident or that she was injured somewhat at that time,

although it is admitted that the serious consequences of her injuries did not fully develop until sometime later. Appellee's version of her injuries and their ultimate consequences upon her physical health and system, is corroborated by lay witnesses, nurses, medical men who attended her and others who testified hypothetically. From such evidence and from other facts and circumstances appearing from the testimony, the jury were warranted in believing the claims of appellee as to the extent of her injuries. The evidence of all the witnesses who testified as to the speed at which the car was being propelled at the time of the impact, is indisputably to the effect that it was going at the usual rate of speed and as fast as at any time during its progress from its northern point of starting upon its southern trip. The evidential facts demonstrate that the car struck the wagon with great force, knocking it against the south end of the opening in the wall; that the wagon was jammed by the car against the wall and was broken; that the wrecking wagon and crew of appellant were called to extricate the wagon and car from this position; that two men in the wagon were thrown off and somewhat injured; that a man on the car was knocked down, some glass and an upright in the car were broken, and other damages were testified to as having been done to the car as the result of its impact with the wagon. So that from all these evidential facts in a collision attended with these results, the jury may, without having done any violence to the probabilities, have honestly believed appellee's statement and that of her witnesses and medical men as to the extent and nature of her injuries, and in our judgment the verdict finds sufficient support in the proof on this branch of the case.

Complaint is made that Dr. Moyer was permitted to testify as to the subjective symptoms about which appellee informed him and which he gathered from making certain tests, such as holding her arm rigidly

at her side, pricking pins into many parts of her body, subjecting her shoulders to various motions, etc., the effect of which upon appellee he had no knowledge other than as appellee informed him. Upon all this Dr. Moyer diagnosed her case as "hysteria." On motion of counsel for appellant, when on cross-examination of Dr. Moyer his diagnosis was disclosed as having been made from these subjective symptoms, the whole of such testimony was stricken out. This operated as a sufficient corrective. Dr. Moyer examined appellee for the sole purpose of qualifying as a witness upon the trial. He was not an attending physician, but an expert witness and was disqualified from giving in evidence anything about which appellee told him as to symptoms which were subjective. *Lake St. El. v. Shaw*, 203 Ill. 39; *W. C. Street Ry. v. Carr*, 170 Ill. 478. Dr. Moyer made two examinations of appellee, and on testifying to that fact, and that his second diagnosis was based upon his first examination as well as his second, on motion of counsel for appellant to strike such testimony from the record, the court said: "The same testimony that I have ruled on with reference to the examination in question should apply to the other examinations referred to by the doctor in his testimony. The evidence of conclusions or opinions of professional experts based upon subjective symptoms, conditions or manifestations are improper and should be excluded from the record."

It is asserted, by this ruling the court evaded its duty to pass directly upon the objection and left it to the jury to judge as to what part of the doctor's evidence should or should not remain in the record. While the ruling was not in the stereotyped form, yet we are unable to see how appellant could have been injured by the ruling of the court in the form in which it was couched. We will assume that the jury was an ordinarily intelligent one, which does no violence to the presumptions of the law, and the jurors were, after

a careful examination by appellant's counsel, accepted unchallenged to try the case. They, being reasonably intelligent men, could not mistake the meaning of the court's ruling in the words used. The court illuminated the whole question involved and thoroughly covered it by the clear statement of his ruling. It was most understandingly favorable to appellant, and to heed the objection now made as well taken would tend to encourage carping technical criticism. The court was guiltless of error in this ruling. We do not regard the objection to the hypothetical question propounded to appellee's medical expert witnesses as impinging the rule, or as being contrary to the doctrine on this subject as laid down in *Chicago City Ry. Co. v. Smith*, 69 Ill. App. 69.

Appellant insists that at the close of appellee's evidence the court should have instructed the jury peremptorily to find a verdict for appellant, based upon the claim that appellant could not be held liable for not maintaining a flagman at the place of the accident or some mechanical appliance or device to give warning of approaching teams and wagons. From what has been heretofore said it will be seen that the duty of appellant in this regard depended upon environing conditions and is a question of fact and not one of law. It was for the jury to say, as a question of fact, whether dangerous environing conditions were pellant, we find on examination and comparison to be had neglected to perform. The refusal to give this instruction, therefore, was not error.

Appellee's second instruction complained of by appellant we find on examination and comparison to be in accord with the ruling in *Chicago & Alton Ry. Co. v. Byrum*, 153 Ill. 131, and to state correctly the extent of the liability of appellant with the limitation, in effect, consistently with the practical operation of the road. While these words were not categorically used, they appeared in other instructions given at the

request of appellant. Under well-settled principles the instructions of the court must be read and treated as a whole, and if all the instructions given, taken together, not separately, state clearly the law of the case, then such instructions serve every legal requirement. The instruction here complained of reads "that it is the duty of a common carrier"—which appellant is—"to do all that human care, vigilance and foresight can reasonably do under the circumstances in view of the character and mode of conveyance adopted reasonably to guard against accidents," etc., and the point argued is, the omission of the words "consistently with the practical operation of the road." Suffice it to say that in appellant's instruction 22 the jury are told that appellant was only required to exercise "the highest degree of care reasonably consistent with the practical operation of the railway," and by appellant's instruction 23 also told that "the carrier is not required to exercise a degree of care which is not reasonable and practical in the operation of its business." *Montgomery Coal Co. v. Barringer*, 218 Ill. 327; *W. C. St. Ry. v. Schulz*, 217 Ill. 322. The jury by these instructions had prominently before them the limitation of appellant's liability, and the criticism and objection are without merit.

An instruction in the language of appellee's second instruction was approved in *Chicago City Ry. Co. v. Shaw*, 220 Ill. 532, which was an affirmance of the judgment of this court in that case, and is therefore conclusive here.

After a thorough consideration of the other instructions, the giving of which is assigned for error, we are unable to find in them any misdirection as to the law applicable to the facts deducible from the evidence. The jury were not only fairly instructed upon the law of the case, but favorably to appellant.

The verdict of \$2,500, it is insisted, is excessive compensation for the injuries resulting to appellee from

the occurrence in question. As before said, the testimony as to appellee's injuries is conflicting. But appellee's testimony, supported as it is by other credible evidence, is to the effect, that her physical condition, proximately attributable to the accident, is seriously impaired, that she has partial paralysis of the left side and that her left arm is useless, which ailments are permanent and incurable. The testimony of the doctors and attendants at the hospitals eleven months after the accident, when she underwent an operation for appendicitis, is of a negative and not a positive character. It is founded on the absence of complaint upon her part. No examination of appellee's body was made by the operating or attending physicians for any troubles other than the appendicitis from which she was then suffering and for which she underwent a surgical operation; neither was she interrogated or inquired of in relation to any other physical ailments. It was for the jury to reconcile the conflict in the evidence. They have done so in favor of appellee. We find ample credible evidence in the record justifying the verdict reached and fully supporting it. The amount awarded is neither large nor excessive as compensation for the impaired physical condition of appellee, which she attributes to the accident resulting from the negligence of appellant. It is unlike *Lake Street El. Co. v. Johnson*, 70 Ill. App. 413, where the plaintiff suffered shock of a temporary nature, had a sprained wrist with some discolorations of the flesh and pain resulting from these specified injuries, but no permanent or incurable injuries which the court held were attributable to the accident.

Counsel for appellant in apparent sincerity and with much force and iteration of incidents attending the trial, with liberal quotations from remarks of counsel and the trial judge, and questions asked by jurymen Harris of appellant's witness Kreusler, together with the several rulings of the court to which they de-

vote thirty-three pages of their brief, charge misconduct in the trial of the case involving counsel of appellee, the trial judge and the jury alike in the sweeping inclusiveness of the criticism, covering the whole course of the trial from its inception to its finality.

The situation thus presented is grave and of the utmost moment, attacking, as it does, the very fountain source of justice and impinging the motives and actions of all concerned in its administration in the trial court. Such charges are not to be dealt with summarily, nor treated lightly, but command our careful scrutiny and judgment. We have carefully considered all that has been urged as "misconduct of the trial," and we find the first clash between counsel was provoked by the statement of counsel for appellant in his opening remarks to the jury outlining the defense, that appellee's case was "*a fake, pure and simple, and that the accident was seized on as a pretext for building up a claim which had no foundation in fact.*" In an endeavor, we may assume, to offset the effect upon the jury of prejudice which such a strong statement was calculated to make upon their minds, counsel for appellee offered to submit his client to a physical examination by any medical man, whom the court might select. A wordy combat on this proposition took place between the opposing counsel, in which both counsel were equally insistent. We think appellee's counsel in making the offer to submit his client to medical examination, as he did, was clearly within his legal rights, and that as a legitimate tactful move, it was made necessary by the broad and sweeping denunciatory charge of appellant's counsel that appellee's claimed injuries were a fake, etc. The ruling of the court in deciding this controversy was in accord with legal precedent and custom. *Commonwealth Electric Co. v. Rose*, 214 Ill. 545.

The record bears indubitable evidence that most of the fierce forensic combats which occurred between

counsel, were in their inception provoked by counsel for appellant and unduly prolonged by his continued insistence and refusal to submit to the rulings of the court. Even the mannerisms, their character not very plainly disclosed by the record, of counsel for appellee were fruitful of objection, but wherein they were otherwise than natural and permissible, we are unable to discern from the record. Counsel of eminence and ability have habitually been noted for individual peculiarities and mannerisms in their conduct of causes before courts, but where they are not subversive of the proprieties of the court room or violative of the rules of law or practice, or do not manifestly tend unduly to prejudice the fairness of the trial, the sanction of the law has been accorded them.

Appellant paid several witnesses for their loss of time, while necessarily attending upon the trial, in excess of statutory witness fees. The amount of such payments and the earning ability of such witnesses were proper subjects of inquiry upon cross-examination and of comment in the closing address to the jury. It was an element by which to aid the jury in gauging the weight to be accorded the testimony of such witnesses in view of that and the other facts developed upon the trial. The witness Kreusler testified that he had received \$28 for his witness fees from appellant and that as a cabinet maker he earned 50 cents an hour and that he had served an apprenticeship of about one year. Juror Harris asked this witness questions in relation to his apprenticeship, and did by such questions evidence some doubt of the witness earning so much on such a short time of apprenticeship. The court however ruled against the materiality of the juror's questions. Whereupon counsel for appellant moved the court—on the claim that the juror Harris in asking these questions had demonstrated such prejudice against appellant as disqualified him further to act in the case as a juror—to withdraw a juror and con-

tinue the cause. The case had then been on trial five days, and the court refused to grant the motion and the trial proceeded. This incident standing alone did not warrant the court's granting the motion or concluding therefrom that the juror's mind was prejudiced or his judgment so warped as to render him unfit to further sit in judgment upon the case. Neither the court nor counsel could then read the mind of the juror on the case as a whole. Whatever misgivings the juror may have shown by the form of his questions on this one point, he may, for aught that appears to the contrary, have been the fairest minded juror of the panel. His remark that he worked for the same company as the witness, though uncalled for, did not necessarily tend to show prejudice unfavorable to the witness or appellant or indicate any hostility. Neither was there anything radically reprehensible from a legal standpoint in the question of the juror Hyslop directly drawn from him by appellant's counsel as to whether or not there was a fender on the car. It was not important to a decision of the case on the evidential facts as a whole, as to whether or not there was a fender on the car, and the court properly overruled both motions of appellant to withdraw a juror and continue the cause.

We do not regard any of the remarks of counsel for appellee in his argument to the jury as overstepping the bounds of propriety or as warranting adverse criticism, when viewed from the standpoint of the facts in evidence concerning which the remarks were made. Counsel was fully justified in drawing such conclusions as he did from the testimony, as long as he did not misquote the witnesses, and we do not find that he was guilty of so doing.

Courts have said that fierce and just invective, when based upon the facts and all legitimate inferences to be drawn from such facts, are not discountenanced. Counsel may rightfully arraign both the conduct of

the parties and impugn, justify or condemn motives, assail the credibility of the witnesses or challenge the incoherency or inconsistency of their testimony, when justified by the record.

We are unable to say that this conduct of counsel for appellee, complained of by appellant, was any more reprehensible than that of counsel for appellant, and, as we have before said, the action and remarks criticised were in the main provoked by opposing counsel. For this reason, if for no other, such remarks being adjudged to be within the reasonable bounds of propriety, the objection is unavailing. *Peyton v. Village of Morgan Park*, 172 Ill. 102.

The impropriety or not of the remarks of counsel rests largely within the discretion and control of the trial judge, and we do not find that such discretion was abused in this trial. *Gallagher v. The People*, 211 Ill. 158.

There is no force to the complaint made to the manner of the polling of the jury. The answer of each juror clearly showed that the verdict was, when signed, and at the time of the polling, the verdict of each juror. All legal requirements in this regard were substantially and understandingly fulfilled.

Lastly it is insisted that the court committed reversible error in keeping the jury confined twenty hours before they finally reached a verdict. There is no rule of law governing the time the court may detain a jury to consider of their verdict. It is a matter resting solely in the sound discretion of the court. This was the third trial of the case. No result had been obtained by the other two trials. It was important that an agreement should be reached, if within the bounds of reasonable possibility. The fruit of every litigated cause rests in the result. Mistrials should be avoided where feasible. The trial lasted through ten days, making eight court days actually devoted to the trial. The evidence was conflicting.

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The progress of the trial bristled with forensic strife and resistance. The instructions upon the law of the case were somewhat voluminous. In view of these conditions, and the well-settled law governing the subject, we cannot say twenty hours was an unreasonable time for the deliberations of the jury, and measured by the result—which is a potent factor to be considered—the court did not abuse the sound discretion vested in it in so detaining the jury. Every juror evidenced his concurrence in the verdict, when polled at the request of appellant's counsel, immediately upon its rendition.

We find, after a painstaking consideration of this record, that the judgment is sustained by the pleadings and the evidence, that the jury were correctly instructed upon the law of the case, and that there is no error in the record justifying a reversal of the judgment of the Superior Court, and it is therefore affirmed.

Affirmed.

J. P. Thomas et al. v. James M. Mosher et al.

Gen. No. 12,720.

1. *APPEAL—how several and joint, must be perfected.* Where several parties against whom a judgment has been jointly rendered are allowed an appeal upon their giving a bond, one of such parties cannot, without the others joining, perfect such appeal. In order to perfect a several appeal, a several appeal must be prayed and allowed.

2. *JOINT DEBTORS—when declarations of one of several, competent as to all.* A *prima facie* case of joint liability having been made, the acts and declarations of one of the parties alleged to be jointly liable are admissible in aid of such *prima facie* case although not made in the presence of the others.

3. *PARTNERSHIP—what evidence tends to prove.* Evidence to the effect that the alleged firm sustained a fire loss and made claim therefor in a partnership capacity, tends to prove the fact of partnership in issue in the cause.

4. INSTRUCTION—*when complaint as to particular, not ground for reversal.* Complaint with respect to a particular instruction, though just, is not necessarily ground for reversal; all the instructions given are to be considered, and if from those instructions as a whole it can be seen that the jury had been fully and fairly instructed as to the law, a reversal will not follow.

Action of assumpsit. Appeal from the County Court of Cook county; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

HUMMER, MURPHY & McDONALD, for appellants.

A. M. & E. P. EASTMAN, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action of assumpsit for work done by appellees as machinists upon certain sewing machine attachments, the property of appellants, and for the price of certain special tools necessary to be provided for the doing of such work. The controversy does not arise so much upon the amount due appellees, which virtually stands uncontroverted, as upon the joint liability of appellants, with Baker, for the debt due for the work done.

While the point has not been raised by either party here, still the record shows (R. p. 21) that all four defendants below prayed and were allowed an appeal to this court. The record also shows (R. p. 23) that only the three Thomases perfected the appeal by giving an appeal bond which was approved by the County Court. In *Hileman v. Beale*, 115 Ill. 355, it was held that the right to an appeal is strictly statutory, and a party to avail of its privilege must conform to the order of the court which the statute authorizes. The perfecting of this appeal is not in conformity with the order allowing the appeal. The appeal is by all the defendants, of which Baker was one. If the Thomases

had desired to appeal without Baker, they had that right. McIntyre v. Sholty, 139 Ill. 171.

Where two or more defendants join in praying an appeal which is allowed on condition they enter into an appeal bond in a given sum within a certain time, none less than all those praying the appeal can perfect it. Town v. Howieson, 175 Ill. 85.

Had a motion been made to dismiss this appeal, we should have allowed it, but as both sides have submitted the case upon the merits we will not do so upon our own initiative, but proceed to consider the merits of the case, regardless of the existing infirmity in perfecting the appeal.

The declaration consists of the common counts, to which is interposed a plea of the general issue, and a special plea by the appellants of non-joint liability as between themselves and their co-defendant Baker. Appellees filed the *similiter* to the general issue and a replication joining issue on the plea of non-joint liability. Upon the issue thus joined a jury trial was had in the County Court which resulted in a verdict of \$293.25 against all the defendants, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered a judgment, in an attempt to reverse which this appeal is prosecuted.

Appellants complain of the admission of evidence on the part of appellees tending to establish joint liability and error in the giving of instructions.

We are satisfied that the evidence in the record fairly tends to sustain the issue of joint liability of appellants with the defendant Baker, providing such evidence is justified by the rules of evidence governing its admission over the objection of appellants.

The evidence not complained about, given to sustain appellees' claim of joint liability, is to the effect that appellants and Baker were in the shop of appellees in February, 1898, and that Baker introduced appellants and appellees, and at that interview said they

were interested in the sewing machine attachments upon which the work was to be done, these attachments then being in the shop of appellees. Thereafter several conversations were proven to have occurred between some of the appellants and appellees in relation thereto. The testimony of Wilson as to conversations with Baker out of the presence of appellants, and of Baker with appellants in relation to the work on the sewing machine attachments and which tended to support the evidence already adduced in relation to the joint liability of appellants with Baker, was admissible in the then condition of the record. A *prima facie* case of joint liability having been made, the acts and declarations of one of the parties alleged to be jointly liable are admissible in aid of such *prima facie* case, although not made in the presence of the others. If appellants and Baker were partners, such partnership was confined to the enterprise in the sewing machine attachments involved in this suit, and where parties so conduct themselves as to become liable to third parties as partners, though in fact they are partners only in a limited sense, declarations of either alleged partner are admissible as tending to show the fact of such partnership and that the debt in controversy is a partnership liability. Strong corroboration of the alleged partnership rests in the fact undenied, that damage to some of the sewing machine attachments having occurred by fire on the premises of appellees where they were stored, appellants under fire insurance effected by them on these attachments, made proof of loss and collected under the policy from the insurance company the amount of such loss. *Daugherty v. Heckard*, 189 Ill. 239.

The action of the court in the admission of this testimony was without error. The evidence shows that appellants were cognizant of the work being done on their property and of the making of the contract in relation thereto, and the law charges them under these

conditions with the responsibility of paying for the work so done. Partridge v. LaPries, 84 Ill. 51.

There is sufficient legal proof in this record warranting the verdict against all the appellants and Baker as partners in the transaction of the subject-matter of this suit. The instructions, taken as a whole, sufficiently state the legal principles controlling the issues. We cannot say from a careful reading of the instructions that the jury were misdirected upon the law of the case. While one instruction—not pretending to state all the law applicable to the case—may be faulty when standing alone, yet when supplemented by other instructions which, taken together, correctly interpret the law of the case to the jury, the requirements of the law are fulfilled. City of Centralia v. Baker, 36 Ill. App. 46; McCormick v. Snell, 23 Ill. App. 79; Norton v. Volzke, 158 Ill. 402.

The requirements were sufficiently met by the instructions given.

Finding no reversible error, the judgment of the County Court is affirmed.

Affirmed.

John Ringelstein v. City of Chicago.

Gen. No. 12,722.

1. ORDINANCE—*how reasonableness of, to be determined.* As the presumptions of law are all in favor of the reasonableness of an ordinance, these presumptions to be overcome must be rebutted by the proofs—or the ordinance upon its face must clearly appear to be unreasonable, before the court is authorized to interpose its authority in holding such ordinance to be void as unreasonable.

2. ORDINANCE—*with respect to keeping and feeding cows, held valid.* A particular ordinance set forth in this opinion regulating the keeping and feeding of cows in the city of Chicago, is held valid, as clearly within the exercise of the police power granted by the State to the city council.

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Prosecution under municipal ordinance. Appeal from the Criminal Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

FRANK O. CAMPE and ALBERT B. GEORGE, for appellant.

HOWARD S. TAYLOR and JAMES DONAHOE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

John Ringelstein, appellant, was convicted and fined \$25 in the Criminal Court of Cook county for a violation of section 964 of the Municipal Code of Chicago, which provides:

“No person or persons, firm or corporation, shall keep or have in his or her possession any slops or refuse of any distillery, brewery or vinegar factory, or any similar slops, mash or refuse, or food that has been subject to fermentation, for the purpose of feeding the same to any milch cow or cows. Each day's failure to comply with this section shall subject the offender to a fine of not less than twenty-five dollars.”

It is admitted in the record by appellant that the article made contraband by the provision of the code cited was found upon the premises of appellant and used for food for milch cows there kept by him.

There is no dispute about the facts. The questions raised are ones of law only. Appellant contends that section 964, *supra*, is unconstitutional, in that it deprives appellant of his right of property, without due process of law. If this provision of the Municipal Code can be sustained, it must find its support in the exercise of the police power in furtherance of the public health and the protection of the citizen against disease.

The common council had authority to pass the

ordinance in question: First, by the express authority conferred by subdn. 66, sec. 1, art. 5, chap. 24, R. S., Starr & Curtis, which provides, "The city council shall have power * * * to * * * pass and enforce all necessary police ordinances," and by subdn. 78, *supra*, "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," and second, without such express power the common council have the right by implication to pass such an ordinance in the exercise of the police power.

As said in *Gundling v. City of Chicago*, 176 Ill. 340, "The preservation of the public health being indispensable to the existence of a municipal corporation, the power to enact ordinances to that end is inherent in a municipality," and as also said by the Supreme Court of Minnesota in *State v. Nelson*, 66 Minn. 166, "any police regulations that did not provide means for insuring the wholesomeness of milk * * * for sale and consumption would furnish very inadequate protection to the lives and health of the citizens."

By the common law it is axiomatic the duty of government to conserve the public health. 1 Black Com. 132 & 133, Sharswood's Edn. "The preservation of health is one of the paramount objects of government." "It belongs to the police power * * * subject to the proper exercise of which, either by the state legislature directly or by public corporations, to which the legislature may delegate it, every citizen holds his property." Dillon on Municipal Corp'ns., sec. 93.

It is a fact of common knowledge that the keeping of cows in cramped and narrow quarters in a densely populated municipality, without the opportunity of open air exercise, impoverishes the quality of the milk of cows so kept, and when to this detrimental environment is added the deprivation of nature's food, gathered from green pastures, upon which their kind have

been pastured from earliest recorded time, and unwholesome swill and slops fermented in vinegar factories and breweries are fed to cows so kept, it becomes evident that the product of cows so fed and housed is more than liable to be unfit for human consumption, and milk from such animals especially unfit for young children; and as said in *Johnson v. Simon-ton*, 43 Cal. 242, "If it indeed be a fact that the milk of cows fed in whole or in part upon still slops is unwholesome as human food, there can be no doubt of either the authority or duty of the board to enact the ordinance in question." The validity of an ordinance—akin to the one now before this court for constitutional interpretation—of the city of San Francisco was challenged in *Johnson v. Simon-ton*, *supra*.

Appellant challenges the reasonableness of this ordinance, contending that whether or not it is reasonable is a question of fact and not of law, and that the evidence received, when considered together with evidence proffered and erroneously rejected against appellant's objection, establishes the unreasonableness of the ordinance.

As the presumptions of the law are in favor of the reasonableness of the ordinance, these presumptions to be overcome must be rebutted by the proofs—or the ordinance upon its face must clearly appear to be unreasonable, before the court is authorized to interpose its authority in holding such ordinance to be void as unreasonable. In *People ex rel. v. Cregier*, 138 Ill. 401, the court said: "It is therefore incumbent upon any one who seeks to have them" (the ordinances) "set aside as unreasonable, to point out or show affirmatively wherein such unreasonableness consists."

In substance the record shows, on the testimony of appellant, that appellant keeps continuously about sixteen cows stabled in a barn thirty-three feet long by twenty feet wide, without bedding of any kind, and

that he feeds them on vinegar slops and keeps each cow in this way about eight or nine months, without exercise. Merrillat, a veterinary surgeon, admits that want of exercise is detrimental to the health of the animals, while Delafontaine, testifying on the part of appellant, states "that there is nothing inherently harmful in vinegar slops as a food for milch cows," yet on cross-examination he admits that vinegar slops will ferment and putrify upon exposure to the air in sufficient warmth and not too much light, that there are then present various products more or less poisonous, including toxines. On the part of the city, Doctor Joseph F. Biehn testifies that poison of various natures, including ptomaine, are found in milk from cattle fed on vinegar slops; that such is injurious to the health of people who do drink it, producing intestinal diarrhoea in young children; that an examination of milk taken from cows fed on vinegar slops developed the fact that it was not wholesome. This testimony, of itself, abundantly establishes both the reasonableness of the ordinance and its necessity and that the product of appellant's cows is injurious to health and provocative of acute disease.

In *La Hote v. New Orleans*, 177 U. S. 587, on p. 589, the Federal Supreme Court adopted in its opinion the dicta of Dillon on Municipal Corpns., sec. 141, that "Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'police laws or regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional."

It is well said in *Gundling v. City of Chicago*, *supra*, p. 348-9: "The regulation of the police power is hardly susceptible of exact definition, as the exigencies of each case are varying and the cases are innumerable where the health of the inhabitants of the

municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than any other form of local evil."

People v. Bowen, 74 N. E. Rep. 489, cited by counsel in support of his contention, on consideration appears to us to have quite the contrary effect. Bowen was dealt with and fined in the sum of \$100 for violating section 12, as amended, of the agricultural law of the State of New York, being similar to the ordinance here in question. While the judgment was reversed, it was for error of fact and lack of proof of a fact made essential of proof by the People to warrant Bowen's being disciplined under section 12, *supra*, which he was charged with violating. The whole subject of the constitutionality of section 12, *supra*, as amended, was both argued and passed upon by the court, and while Mr. Justice Werner filed an exhaustive dissenting opinion in which Mr. Justice Haight concurred, the whole bench of the Court of Appeals unanimously held that the law under which Bowen was prosecuted was constitutional "as a proper exercise of the police power in order to prevent fraud and preserve health." See p. 492.

Exhibits A and B, offered by appellant and excluded by the court, are of the same character of evidence as the report of the board of health held to constitute hearsay evidence in *City of Montezuma v. Minor*, 73 Ga. 484, and inimical to the same objection. The ordinance of the city of Chicago regulating the keeping

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and feeding of cows in question, is clearly an exercise of the police power by the common council delegated to it by the express words of the statute *supra*, and valid and binding as a law of that municipality, and is in no respect violative of any provision of the organic law, state or federal. It is an ordinance necessary for the preservation of the health of the people and to guard against disease.

The Criminal Court is guiltless of error in its judgment, and its judgment is therefore affirmed.

Affirmed.

Max Parnass v. Martin A. Ryerson.

Gen. No. 12,724.

1. BILL OF EXCEPTIONS—*when recitals of, control record proper.* Where there is a conflict between the recitals of the bill of exceptions and the record proper, the recitals in the bill of exceptions must prevail over those in the record because the solemn act of signing and sealing the bill of exceptions by the judge, being final, is, in legal intendment, the more deliberate action of the court. An exception to this rule, however, is where the matter in question does not come within the function of the bill of exceptions, in which case the record proper controls over the bill of exceptions.

2. BILL OF EXCEPTIONS—*what not function of.* It is not the function of a bill of exceptions to show the priority of the hearing of motions, the entry of the record orders therein, or in fact that an appeal was prayed or granted.

3. APPEAL BOND—*effect of recitals in.* Recitals in an appeal bond do not cure defects with respect to matters of record.

4. REVIEW—*what ruling not subject to.* The ruling of the court on a motion to satisfy an execution *pro tanto* not being embraced in the order allowing the appeal, is not before the Appellate Court for review.

5. ABANDONMENT—*what tends to establish, within terms of lease.* An abandonment of the demised premises is tended to be shown by evidence that the premises, which were used for business purposes, were left vacant and unoccupied with respect to persons in possession, and likewise with respect to merchandise.

Judgment by confession. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8 1906.

ADLER & LEDERER, for appellant.

HERRICK, ALLEN, BOYESEN & MARTIN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

On March 7, 1905, a judgment was entered by confession in the Circuit Court in favor of appellee and against appellant, for \$666.66, by authority of a warrant of attorney contained in a lease to Parnass by Ryerson, of the premises 242 Madison street, Chicago, the judgment being for rent due for the months of February and March 1905.

Parnass entered his motion to "set aside and vacate the judgment * * * and for leave to plead, or that the execution issued on said judgment be satisfied *pro tanto* to the extent of one hundred sixty-six & 66-100 dollars." These motions are founded upon the fact that about the 16th or 17th of March, 1905, Ryerson—treating the possession by Parnass of the demised premises as abandoned—made an entry, took and retained possession thereof under a covenant in the lease so empowering on an abandonment of possession by Parnass.

It will be observed that the motion being in the disjunctive is dual, and the record shows the court so treated it.

R. p. 14 recites: "This day comes the defendant and enters herein his motion to set aside the judgment heretofore rendered herein and for leave to plead herein. After arguments of counsel and due deliberation by the court said motions are overruled and denied. Thereupon defendant, having entered his exceptions herein, prays an appeal from the above order

of this court to the Appellate Court. Appeal allowed. Penalty of bond and time fixed in which to file same and bill of exceptions. Following the foregoing (R. p. 15) is the further recitation: "Whereupon the defendant enters his motion to satisfy the execution issued herein *pro tanto*, which motion is also hereby overruled and denied."

A variance between the recitations of the record and bill of exceptions is averred as to the motion to satisfy the judgment *pro tanto*. Where there is a conflict between recitations in the bill of exceptions and the record, the recitations in the bill of exceptions must prevail over those in the record, because the solemn act of signing and sealing the bill of exceptions by the judge being final, is in legal intendment the more deliberate action of the court. This is in accord with what was said in *Hirth v. Lynch*, 96 Ill. 409, that "where recitals of the record of proceedings as made by the court and the statements of a bill of exceptions signed by the judge are not in harmony, we must take the real truth to be as stated in the bill of exceptions." *Catholic Order of Foresters v. Fitz*, 181 Ill. 206. The bill of exceptions when signed and filed in the case imports verity, and no presumptions can be indulged to the contrary. *Long v. Linn*, 71 Ill. 152.

We turn to the bill of exceptions (R. p. 23), and we there find that exceptions were taken to both the orders denying the two motions before the court. But in this there is neither variance nor contradiction of the record. In fact it is in harmony with the record. (R. pp. 14, 15.)

The bill of exceptions does not purport to show the priority of the hearing of the motions, the entry of the record orders therein, or in fact that an appeal was prayed or granted. That was not the function of the bill of exceptions. These orders belong, where found, in the record.

Recitations in an appeal bond of matters recited as

being of record, which fail to find support in the record, are of no avail.

The ruling of the court on the motion to satisfy the execution *pro tanto* not being embraced in the order allowing the appeal, is clearly not before us for review. It follows that this appeal brings before us for review the correctness or not of the action of the court in denying the motion of appellant to set aside the judgment and for leave to plead. To this alone our power and duty alike are circumscribed.

In *Lake Shore etc. v. Chicago Western Ind.*, 100 Ill. 21, it was held that an appeal brings up for review only such matters as preceded the entry and perfecting of the appeal and not any matter which occurred subsequently. To like effect is *Pennsylvania v. Greso*, 79 Ill. App. 127.

There is no contention in this record but that the acts relied upon by appellant as reasons why the motion—to set aside the judgment by confession and for leave to be admitted to plead—should be granted, occurred subsequent to the entry of the judgment. This position being conceded, we will proceed to determine the law affecting the rights of appellant under the conditions thus presented.

In *Lake v. Cook*, 15 Ill. 353, both the power and the duty of courts over judgments entered by confession are quite thoroughly discussed, and upon this early decision rests most of the law in this state on this subject. It was there decided that courts of law exercise equitable jurisdiction over judgments entered by confession and that where an application is made for its exercise, and it clearly appears that the plaintiff was not entitled to the judgment, it is the court's duty to vacate it upon terms equitable as between the parties. Inferentially this means a defendant shall be permitted to make any legal defense which existed at the time judgment was entered. We find no authorities in this state holding a contrary doctrine, when the facts

underlying the cases have been ascertained and applied to the principles of law enunciated and disregarding statements found in some of the cases clearly *obiter*.

In *Condon v. Beese*, 86 Ill. 159, the language used was "that where it clearly appeared that plaintiff was not entitled to judgment it would be set aside * * * " which plainly refers to defenses existing at the time of the entry of judgment. *Martin v. Stubbings*, 20 Ill. App. 381, referred likewise to defenses existing at the time of judgment.

Coming to the merits as disclosed by appellant's affidavit, we find that appellee gave notice of his having entered the premises demised to appellant and that he found a few articles of little consequence and of but slight value which he informed appellant he would hold subject to his order. The demised premises were entered on a claim that appellant had abandoned them and gone out of possession. These premises are situate in the business centre of the metropolitan city of Chicago. No stock of goods was found on the premises and the business of clothing and gents furnishing goods theretofore carried on had ceased to exist. The place was closed and the wheels of commerce had there ceased to revolve. Appellant had also ceased to pay rent. These conditions are, to say the least, *prima facie* evidence of an intentional abandonment of the premises by appellant within the meaning of the covenants of the lease. The evidential facts were wholly insufficient to authorize the court to open the judgment and let appellant in to recoup damages for the alleged trespass to his constructive possession. Even conceding that the claim made by appellant, if well founded, would entitle him to litigate it in the confession case, the facts averred as reasons for allowing him so to do lend no force to his claim and fairly refute his alleged cause of action.

If appellant shall still be advised that he has a

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meritorious action against appellee on the evidence claimed, he has the right to attempt its enforcement in an appropriate original action; consequently no harm or injustice arises from not permitting him to enforce such claim in this action.

Finding no error in the action of the Circuit Court in denying the motion of appellant to set aside the judgment entered by confession and for leave to plead, the judgment is affirmed.

Affirmed.

Sylvester L. Derby v. John Peterson.

Gen. No. 12,753.

1. INSTRUCTION—*when need not be in writing.* A peremptory instruction upon an uncontradicted fact need not be in writing.

2. MOTION FOR NEW TRIAL—*essential to review.* The very essence of the right to a review of the record in a law case rests on the making of a motion for a new trial and the overruling of the same with proper exception; failure to make such motion for a new trial waives the right to review in the Appellate Court.

Action of debt. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed October 8, 1906.

DAVID S. GEER, for appellant.

LANTRY & LYON, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action of debt upon two bonds, one an injunction bond and the other a bond given in an appeal case to this court, in both of which appellant was surety.

On issue joined the cause was tried before the court

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and a jury and on evidence proffered by appellee and admitted by the court, consisting of the two bonds sued and counted upon in due and sufficient form in the declaration, the order of the court dissolving the injunction and assessing damages for its wrongful suing out at the sum of \$200, certified copy of the order of this court affirming the judgment in the case appealed, in which a judgment for costs was rendered against the principal in the appeal bond, the testimony of a witness who computed the interest accrued on the amount assessed as damages on the dissolution of the injunction. Appellant failing to offer any evidence or assign any valid reason why a verdict should not be rendered for the amount of debt and damages appearing to be due, the court verbally instructed the jury to return a verdict in favor of the appellee for \$400 debt, the penalty of the two bonds, and \$221.20 damages, upon which a judgment was entered in due form directing a discharge of the debt upon payment of the amount assessed as damages, with costs of suit. The court directed one of the jurors to sign the verdict as foreman. Appellant excepted to the action of the court in verbally directing a verdict and instructing a juryman to sign the same as foreman. Thereupon appellant moved the court to arrest judgment, which motion the court overruled, and appellant excepted and prayed this appeal.

While the condition of this record inhibits its review in this court, yet we have considered the same and find ample proof in it to support the verdict and judgment. Appellee's proof uncontroverted imposed upon the trial judge the duty of directing a verdict for the amount of debt and damages thus unchallenged due appellee. Such direction was not an instruction to the jury upon any question of law involved, but a direction as to the uncontradicted fact, and the statute which provides that courts shall instruct the jury upon the law of the case in writing only, has no application here.

As the court well said in *Young v. Wells Glass Co.*, 187 Ill. 626: "The jury were, under the evidence then before them, bound to find for the plaintiff the amount due under the contract, as there was no evidence upon which to allow any damages to the defendant." This language is equally applicable here. The claim for damages, made by defendant as an offset to plaintiff's claim in *Young v. Wells*, *supra*, having been disallowed by the court, nothing remained for the jury to do but return a verdict in the amount which the uncontradicted testimony properly before them showed to be due the plaintiff. The purpose of a jury retiring from the bar of the court to consider of their verdict, is to settle disputes arising from the evidence. Where no disputes exist, retiring from the bar of the court is unnecessary and the court may properly direct a verdict.

But, if for no other reason, this judgment must be affirmed, because appellant failed to make a motion for a new trial. The very essence of the right to a review of a record in this court in a law case rests on the making of a motion for a new trial and the overruling of the same with proper exception. Failure to make such motion for a new trial waives the right to review here. *Call v. The People*, 201 Ill. 499.

As said in *Garthwait v. Board of Education*, 117 Ill. App. 59: "It must be regarded as settled law in this state that in a case at law, tried by a jury, there must after verdict be a motion for a new trial, action by the court overruling such motion and exception thereto, to authorize an Appellate Court to review the questions involved in the admission or exclusion of evidence, the giving, modifying or refusal of instructions and the sufficiency of the evidence to support the verdict." These indispensable requisites must also be preserved in the bill of exceptions. *Salomon v. Ellison*, 102 Ill. App. 419; *Dearborn v. Reilly*, 79 Ill. App. 281.

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Appellant has shown no merit in his defense. There is no error apparent from the record. If error there was in this record, the failure of appellant to make a motion for a new trial bars this court of jurisdiction to disturb the judgment of the Circuit Court, and it will therefore be affirmed.

Affirmed.

Elenor Lyman et al. v. William S. Kline et al.

Gen. No. 12,615.

1. **PROMISSORY NOTE**—*in whose name suit may be brought.* Where a note is indorsed in blank, suit may be brought in the name of any person who does not object.

2. **VARIANCE**—*power to confess, when exercised, waives question of.* The power under which a judgment has been entered by confession operates to waive all questions of variance between allegations and proof.

3. **LEAVE TO PLEAD**—*effect of granting, where judgment has been entered by confession.* A waiver of technical objections to judgments entered by confession results from seeking and obtaining leave to plead.

4. **INSTRUCTIONS**—*rule requiring presentation of, prior to argument, construed.* This rule may be waived in the exercise of a sound judicial discretion.

5. **JUDGMENT**—*mere excessiveness of, not ground for reversal* The mere fact that a judgment is excessive is not ground for reversal; if the error may be corrected by computation and reduction of the judgment to the proper amount, it will be ordered done by the Appellate Court and an affirmance entered for the correct amount.

Judgment by confession. Appeal from the Superior Court of Cook county; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded with directions. Opinion filed October 8, 1906. Re-hearing denied October 25, 1906.

WILLIAM T. DICKERMAN, for appellants.

C. A. COOLIDGE and T. W. BROWN, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Judgment was entered for \$1,350 against appellants in favor of appellees in the Superior Court May 20, 1902, upon three promissory notes for \$400 each, all bearing interest at six per cent. per annum, with powers of attorney attached in the usual form authorizing entry of judgment by confession. On July 7th following, on motion of appellants, based upon affidavits then filed, appellants, by an order then entered, were allowed to plead to the merits, the judgment in the meanwhile standing as security and execution being stayed until the further order of the court.

Issues were joined on pleas of failure of consideration, want of consideration and fraud and circumvention in obtaining the notes.

The evidence developed that B. F. Stull, a lawyer of appellant Elenor Lyman, represented to her that he was the owner of certain timber lands in Fentress county, Tennessee, and agreed with her to sell and convey to her certain of said lands by a good fee title for the consideration of \$200 in cash and the three notes of appellants the subject-matter of this litigation. That at the time Stull procured delivery of these three notes he told Mrs. Lyman that he would make the deed and would record the same in the proper office in Fentress county, Tennessee; that he would hold the notes until their maturity or until Mrs. Lyman could sell enough timber from the lands so to be conveyed to pay the notes, and that he would not sell the notes. Relying upon these representations the notes were delivered, although Mrs. Lyman claims that she was unaware of the fact that the notes were judgment notes. That it subsequently developed that Stull's representations as to ownership of timber lands in Fentress county were false, that he failed to make a deed to Mrs. Lyman of any lands and in disregard of his promise transferred the notes, resulting in the judgment confessed in favor of appellees.

The principal errors relied upon to reverse the judgment, resulting from the trial upon the issues joined, are that appellees are not the owners of the notes, that appellees had notice of the fraud and circumvention practiced by Stull in obtaining the same, error in giving instructions at the instance of appellees and refusing others proffered by appellant, and in the court's accepting an instruction offered by counsel for appellees and giving the same to the jury after the lapse of time prescribed by rule 25 of the common law rules of the Superior Court, which provides that "All instructions must be presented to the court at the conclusion of the taking of the evidence." variance between the evidence and averments of the declaration, and that the verdict is irregular and the judgment entered thereon contrary to law.

We will pass upon these objections in the order of their statement.

It is admitted that the notes were indorsed by Stull and delivered to D. S. Wentworth without naming an assignee, which is commonly understood as an indorsement in blank—the title to such a note passes by delivery without further indorsement. Wentworth was a lawyer and in the purchase of the notes represented appellees and four other persons with whose money Wentworth paid for the notes and in whose interest he purchased them, and at the time of the confession appellees and the four other persons were interested in whatever might be realized therefrom in the several proportions in which they had contributed toward their purchase. That appellees—who had each contributed more than the others toward the purchase of these notes, for that reason and for convenience, and also to avoid multiplicity of parties plaintiff and under the advice of Wentworth—brought the suit in their names.

Appellants were not denied the benefit of any defense which they could have made had all the parties

interested in these notes been parties to the suit. Their rights have in no way been curtailed or affected to their disadvantage. It is well settled that where a note is indorsed in blank suit may be brought in the name of any person who does not object, about which a defendant has no concern and cannot be heard to complain. *Whitford v. Herting*, 60 Ill. App. 413; *Henderson v. Davisson*, 157 Ill. 379.

Campbell v. Goddard, 117 Ill. 251, cited by appellants, is not in point. There the judgment by confession was entered in the Circuit Court of Williamson county before the clerk in vacation. The power of attorney to confess judgment contained a provision for reasonable attorney's fees upon judgment being confessed, without naming any specific sum. The judgment included \$125 as a reasonable attorney's fee, and it was held that fixing that amount as a reasonable attorney's fee was, in effect, a judicial act, by a ministerial officer, and was void for want of power in the clerk. That question cannot arise in Cook county, where the terms of court are encompassed within each of the twelve months of the year. It is always term time in the *nisi prius* courts of Cook county. There is no vacation between terms. None of the other authorities cited by appellants on the question of the right to maintain suit on a note indorsed in blank in the name of another than the beneficial owner, upon examination is found to sustain their contention.

We are restricted to the testimony of appellant Lyman and D. S. Wentworth as to knowledge imputable to appellees of the existence of the defenses to these notes set up in the pleas. Wentworth, who knew Mrs. Lyman before purchasing these notes, called upon Mrs. Lyman and inquired of her in relation to them, when he says she informed him that the notes were given for land she was buying in Tennessee, that she knew all about the property she was buying, that she

owned 160 acres of land in the same county, that Stull had been her attorney in other matters and had examined the title to the land she was then buying and that she was satisfied, and that she signed the three notes in evidence then exhibited to her by Wentworth. While Mrs. Lyman does not deny that she acknowledged to Wentworth that she made the notes and that they were given for purchase of lands in Tennessee, she at the same time claims that she informed Wentworth of the conditions under which she claimed she made the notes and delivered them to Stull and of the latter's promise not to part with them. If available as proof, being substantive matter, the *onus* of maintaining it by a preponderance of the evidence rests upon appellants. In no view of this evidence can it be said there is any preponderance in appellants' favor. The attendant conditions and circumstances are not in accord with this statement of Mrs. Lyman, and Wentworth denies its truth *in toto*. Some credence and support is given to Wentworth's denial, from the fact that it was not until seven days after the judgment was entered by confession on these notes that Mrs. Lyman learned of the duplicity of Stull and the falsity of his representations. It consequently follows from what we have said that appellants have failed to show that notice of either a failure or want of consideration came to appellees or any of the persons beneficially interested in the proceeds of the three notes before their delivery by Stull to Wentworth, indorsed in blank, for the consideration of \$1,000, nor are there any facts or circumstances in appellants' proof from which notice can be imputed to them, or as coming to Wentworth, their representative. While fraud and circumvention is charged in the obtaining of these notes, no proof from which it can be adjudged such charge is sustained can be found in the record.

What constitutes fraud and circumvention is defined in *Town of Oregon v. Jennings*, 119 U. S. 74,

thus: "The fraud and circumvention intended by the statutes, which only embodies a rule of the common law, must be a trick or device by which one kind of instrument is signed in the belief that it is of another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer." Applying this definition to the facts of this case, we find none of the essential elements constituting fraud and circumvention. There is nothing in the evidence that Stull induced appellants to sign the three notes in question by representing that they were anything but notes, nor was any trick resorted to by Stull to induce, or which did induce, appellants to believe they were anything else but notes which they purported to be on their face; neither did Stull resort to any artifice in an effort to prevent appellants, or either of them, from freely examining the notes to ascertain their contents and terms. The representation, the *gravamen* of the charge, is that Stull told Mrs. Lyman that he would hold the notes and not assign or part with them, that she might pay them with the proceeds of the timber to be cut from the land Stull was to convey to her by a deed conveying a good fee title. Appellants were not thereby relieved from their liability as makers of the notes to respond in payment to an innocent assignee for value because of the failure of Stull to keep his verbal promise, about which the notes gave no information, so that a stranger to that portion of the transaction—which appellees are—could have notice of it. Appellants are therefore held to the legal responsibility arising from their having made the notes and by delivering them to Stull indorsed in blank, thereby putting it in his power to negotiate them to parties innocent of his verbal promises and undertakings. Mrs. Lyman's evidence alone is sufficient to refute the defense of fraud and circumvention by Stull in procuring appellants to make and deliver the notes to him. The duplicity complained of by her is not in

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obtaining the notes, but on the contrary the bad faith of Stull consists in Stull's failure to retain the notes and to convey a good title to her, according to her evidence, of the Tennessee timber land, and record such deed in the proper office in faith of his verbal promise made at the time of receiving the notes from Mrs. Lyman.

We are unable to find any error in the instructions given on the part of appellees, to the giving of which appellants complain. As given they announce correct principles of law, applicable to the facts in evidence and the issues joined. Neither was any error committed by the trial judge in modifying appellants' instruction No. 7, by eliminating therefrom the words, "The law presumes that an agent transmits or in some manner communicates to his principals all information received by him relating to the matter of his agency." The presumption of law thus assumed is not correct, although notice may be imputed to the principal of facts communicated to the agent in relation to the subject-matter of his dealings as agent within the scope of his agency, without proof of such facts having been communicated directly to the principal. Applying this legal principle to this case, if appellants had proven notice to Wentworth, the agent, of either the want or failure of consideration or fraud and circumvention in obtaining appellants to make and deliver the notes to Stull before Wentworth purchased them, such notice would be chargeable to Wentworth's principals, and the notes would have been purchased by him subject to all defenses which could be interposed in an action brought thereon by Stull.

The changed instruction No. 1, given at the request of appellees, the giving of which is assigned for error, could not have had the effect of misleading the jury as to the law of the case, even if that part intended to have been expunged was so imperfectly done as to be readable by the jury in its jury room in its entirety,

as without any alteration it stated a correct principle of law applicable to the facts in evidence. Before interlining by the court it read: "The jury are instructed that a written agreement cannot be changed or varied by a prior or contemporaneous oral agreement between the parties, but that all negotiations, promises and agreements are merged in the written agreement executed by the parties, and even though you may believe from the evidence that Stull, at the time of taking the notes in evidence, told Mrs. Lyman that he would not require the payment of the notes according to their terms, that fact would not vary or change the terms of the notes." As read by the court to the jury the instruction was as follows: "Even though you may believe from the evidence that Stull, at the time of taking the notes in evidence, told Mrs. Lyman that he would not require the payment of the notes according to their terms, that fact would not change or vary the terms of the notes." The instruction as given was equally invulnerable to legal objection when considered together with the other instructions appearing in the record as given with it.

Complaint is made on the ground of variance between the averments of the declaration and proof. Objections of this character cannot be reviewed where all errors are waived in the warrant of attorney in virtue of which the original judgment was confessed. We held in *Roby v. Updyke*, 61 Ill. App. 329, that a waiver of technical objections to judgments entered by confession results from seeking and obtaining leave to plead. To the same purport and effect are: *Frear v. Commercial National Bank*, 73 Ill. 473; *Hall v. Jones*, 32 Ill. 38; *Hall v. Hamilton*, 74 Ill. 437; *Carpenter v. First National Bank*, 119 Ill. 352.

The error assigned on the action of the court in receiving and giving an instruction after the time limited by common law rule 25 is without force. This rule was made for the convenience of the court and in

order to enable the judge to examine the instructions and determine upon their applicability to the issues and the proof during the argument of counsel to the jury, but the most that can be said for the rule is that it being one which is personal to the court in its operation, the court may in the exercise of a sound discretion, to be measured by conditions, waive the rule and receive additional instructions at any time. In fact it is not at all free from doubt, that in certain circumstances it might not become the court's duty to do so. For illustration, supposing a counsel in his closing argument had traveled outside of the record for his facts—not an infrequent occurrence—materially affecting the issues, and no instruction had been handed to the court before the commencement of the argument telling the jury that their verdict must be based upon the evidence heard and admitted by the court, and warning them not to heed statements made by counsel, if any such had been made, which did not find support in the record, etc., could the court be excused by the rule in refusing to give such an instruction, tendered before the court commenced to read the instructions to the jury, in a case where it might be apparent that such unwarranted statements, unsupported by the evidence, were of a character tending to mislead the jury? Certainly not! *Prindville v. The People*, 42 Ill. 217, and *I. C. Ry. v. Haskins*, 115 Ill. 300, are not in point as controverting the sanction of any such practice. In these cases the question here was neither presented nor decided. The rule as to the time of tendering instructions was upheld as reasonable, but the power of the court to vary such rule, in a proper case, in the exercise of a sound discretion and to receive and give an instruction tendered after the time provided by the rule had expired, was not passed upon in cases *supra* cited by appellant.

The errors last appearing are well assigned. The

verdict of the jury is informal and the judgment entered thereon erroneous. The form of the verdict of the jury should have been: "We, the jury, find the issues for the plaintiffs." The assessment of damages was surplusage and should have been disregarded by the court in the entry of the judgment. The effect of the judgment in its present form is to charge appellants with compound interest on the amount of the interest accruing between the date of the entry of the judgment by confession and the return of the verdict of the jury in the trial upon the merits. This is unlawful. The informality, however, in neither the form of the verdict nor the judgment entered thereon would justify this court in awarding a new trial. Such error can be corrected without affecting the merits of the cause or the rights of appellants. The error being merely as to form and not of substance may be amended at any time to make the same effective, and as such judgment in its amended form will reduce and not increase the liability of appellants, they cannot be heard to complain.

For the errors indicated the judgment of the Superior Court of Cook county is reversed and the cause remanded to the Superior Court with instructions to vacate the judgment of February 25, 1905, and to enter in its place and stead a judgment in the following form: "Therefore it is considered by the Court that the judgment entered herein on May 20, 1902, in favor of plaintiffs and against defendants for \$1,350. stand in full force and effect as of the time of its rendition."

Reversed and remanded with directions.

Smith v. Alexander.

Shea Smith v. William A. Alexander.

Gen. No. 12,558.

1. **CONTRACT**—*sale, with agreement to repurchase, valid.* A contract is valid by which stock is sold with an accompanying undertaking by the vendor to repurchase within a specified period.

2. **FALSE REPRESENTATIONS**—*when do not confer cause of action.* Mere representations of value by the vendor, even though false, are not actionable.

Action of assumpsit. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed June 14, 1906. Rehearing denied October 8, 1906.

ARTHUR B. WRIGHT, for appellant.

SAMUEL S. PAGE and ARTHUR B. FLEAGER, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment sustaining a demurrer to appellant's declaration, which consists of five counts, the second count being an amended count. The first count is as follows:

"For that, whereas, heretofore, to-wit, on the 18th day of June, 1891, at to-wit, the City of Chicago in the County of Cook and State of Illinois, the said plaintiff bargained for and bought of the said defendant, and said defendant sold and delivered to said plaintiff, fifty (50) shares of the capital stock of the Drexel Car Coupler Company, a corporation organized under the laws of the State of Illinois, for the sum of three thousand dollars (\$3,000), good and lawful money of the United States, which said sum of money the said plaintiff then and there paid to the said defendant, on condition that the said defendant would, at any time within one year thereafter, when he should thereunto be requested by the said plaintiff so to do, re-

purchase the said fifty (50) shares of the said Drexel Car Coupler Company and pay to the said plaintiff therefor the said sum of three thousand dollars (\$3,000) and interest thereon from the date of said sale at the rate of seven (7%) per centum per annum; and the said plaintiff, afterwards, to-wit, on the 18th day of June, 1892, and at many other times during, to-wit, the period of one year from the 18th of June, 1891, at, to-wit, the City of Chicago, in the County of Cook and State of Illinois, tendered to the said defendant the said fifty (50) shares of stock of said Drexel Car Coupler Company and demanded and requested the said defendant to repay to the said plaintiff the said sum of three thousand dollars (\$3,000) and interest as aforesaid, according to the tenor and effect of said agreement. And the said defendant thereby became and was liable to pay to the said plaintiff the sum of three thousand dollars and interest thereon at the rate of seven per centum per annum from the date of said sale, to-wit, from the eighteenth day of June, A. D. 1891, and being so liable the said defendant afterwards, to-wit, on the day aforesaid, at, to-wit, the City of Chicago, in the County aforesaid, promised to pay to the said plaintiff the said sum of three thousand dollars and interest aforesaid. Yet the said defendant, through frequently requested by the said plaintiff so to do, failed and refused to pay to the said plaintiff the said sum of three thousand dollars (\$3,000) and interest, according to the tenor and effect of said agreement, but then and there requested the said plaintiff to extend and enlarge the time limited by said agreement within which he, the said defendant, should be required to repurchase said shares of stock in said Drexel Car Coupler Company. And afterwards, on, to-wit, the 9th day of November, 1893, the said defendant at, to-wit, the City of Chicago in the County aforesaid, being so liable to pay said sum of money and interest as aforesaid, in consideration of the promises and in consideration of the extension by the said plaintiff of the time within which the said defendant should be required to repurchase said shares of the capital stock of said corporation, and repay to said plaintiff said sum of

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three thousand dollars and interest thereon at the rate of seven per centum per annum, as aforesaid, undertook and agreed to and with the said plaintiff in and by a certain letter in writing duly signed by said defendant, to repurchase of and from the said plaintiff said fifty (50) shares of the capital stock in said corporation on or before the 19th day of July, 1894, and to pay to the said plaintiff therefor the said sum of three thousand dollars therefor, and also to pay to said plaintiff interest on the said sum of three thousand dollars (\$3,000) at the rate of seven per centum per annum until paid, which said letter, contract or agreement was in words and figures following, that is to say:

‘November 9, 1893.

SHEA SMITH, Esq., Van Buren St., City:

Dear Sir: Enclosed please find check for two hundred and ten dollars (\$210), being seven per cent (7%) interest on three thousand dollars (\$3,000) invested in Drexel stock for one year, beginning July 19, 1892, and ending July 19, 1893. Will pay you the same amount July 19th next or take the stock off your hands between now and that time. Pardon me for overlooking this, please.

Yours truly,

W. A. ALEXANDER.’

Which said letter, contract or agreement was delivered to and received and accepted by said plaintiff on, to-wit, the eleventh day of November, 1893, and there and thereby the said letter and contract became and was valid and binding and in full force and effect between the said defendant and the said plaintiff.

And the plaintiff avers that afterwards, to-wit, on the 19th day of July, 1904, the said plaintiff at, to-wit, the City of Chicago, in the County and State aforesaid, and during the business hours of said day, to-wit, between the hours of 9 o'clock A. M. and 5 o'clock P. M. on said day, tendered to the said defendant said fifty (50) shares of stock in the Drexel Car Coupling Company, and demanded and requested of the said defendant the said sum of three thousand dollars (\$3,000) and interest, as aforesaid, and there and thereby the

said defendant became and was liable to pay to the said plaintiff the said sum of three thousand dollars and interest as aforesaid, and being so liable the said defendant afterwards, to-wit, on the day aforesaid, at, to-wit, the city and county aforesaid, promised to pay to the said plaintiff said sum of three thousand dollars and interest as aforesaid. Yet the said defendant, though often requested, failed and refused to accept and receive said shares of stock, and wholly failed and neglected to pay to the said plaintiff said sum of three thousand dollars (\$3,000) and interest thereon, as aforesaid, or any part thereof. And the said plaintiff now here in open court comes and tenders to the said defendant the said fifty (50) shares of the capital stock of said corporation aforesaid."

Counsel for appellee, in their argument, say: "This count may be taken as an illustration of all, although they differ somewhat in details." Appellee demurred generally and specifically to each count.

Before considering the sufficiency of the first count, and preliminary thereto, certain misconceptions of counsel may be noticed. Counsel for appellee assume, in their argument, that the agreement declared on was oral, because it is not averred to have been in writing. When a statute provides, as does the Statute of Frauds, that certain contracts, to be valid, must be in writing, it is not necessary, in declaring on such a contract, to aver that it was in writing. Browne on the Statute of Frauds, 4th ed., section 505, and cases cited. *A fortiori* this is true when, as in this case, the contract is not required by law to be in writing. Counsel for the parties, respectively, refer to the Statute of Limitations as applicable to the declaration. The decision of the court was on demurrer to the declaration, and, in passing on the demurrer, the court was limited to inspection of the declaration. It is not averred in the first, or any other count of the declaration, when the suit was commenced; consequently, no question as to the Statute of Limitations is raised by the demurrer.

Whether, if the date of commencement of the suit had been averred in the declaration, the Statute of Limitations could have been relied on, on demurrer, is a question not before us, and on which we express no opinion. In the first count, next preceding the words "and afterwards, on, to-wit, the 9th day of November, 1893," is averred, in apt language, a good cause of action. On demurrer, the material facts well pleaded must be assumed to be true, for the purpose of passing on the demurrer.

The agreement averred is, in substance, that the plaintiff (appellant here) purchased, June 18, 1891, of the defendant fifty shares of the capital stock mentioned, for the sum of \$3,000, which plaintiff paid to the defendant, on the condition that the defendant would, at any time within one year thereafter, on plaintiff's request, repurchase the same from plaintiff, and pay therefor \$3,000 with interest at 7 per cent. per annum from the date of sale. This was a valid agreement (*Ubben v. Binnian* 182 Ill. 508; *Wolf v. National Bank of Illinois*, 178 ib. 85), and its breach by appellee is sufficiently stated. Counsel for appellee contend that there was no consideration for any agreement, on appellant's part, to grant any extension of time to appellee for the repurchase by appellee of the stock, and that there being no consideration, appellant was not bound by the letter and its alleged acceptance, and might have sued appellee at any time, notwithstanding the same. In this view we concur. Counsel for appellant urge that appellant did, in fact, forbear for a year; but the declaration, to which only we can look in reviewing the decision of the learned judge of the trial court on the demurrer, does not so aver, and, therefore, we cannot know it. We are also inclined to support the view of counsel for appellee that, while the letter of November 9, 1903, may be important to appellant as evidence on the trial in case the Statute of Limitations shall be pleaded and a new promise re-

plied, it should not have been pleaded. However, if these views are correct, the part of the count relating to the extension of time for appellee to repurchase, and to the letter of November 9th, may be disregarded as surplusage, and, as such, cannot prejudicially affect the prior part of the count, which, as we have stated, avers a good cause of action. *Utile per inutile non vitiatur*. Broom's Legal Maxims, 8th Am. ed., sections 627 and 628; Lusk v. Cook, Beecher's Breese, 84. Mere surplusage is not reached by demurrer. 1 Chitty on Pl., 9th Am. ed., 229.

We are of opinion that the first count is good.

The third count avers a guaranty; but, in so averring, alleged false representations of the value of the stock by appellee are evidently relied on as a guaranty. The doctrine is familiar that mere representations of value by a vendor are not actionable, even though false. Endsley v. Johns, 120 Ill. 469, 480.

We think the amended 2nd count, and the 4th and 5th counts good counts. The suit is on the original agreement, independent of the letter of November 9, 1893, and the effect of that letter, if the appellee should plead the Statute of Limitations, is a question not before us on this appeal.

The judgment, in so far as it sustains the demurrers to the first count, the amended 2nd count, and the 4th and 5th counts, will be reversed, and the cause will be remanded, appellant to recover his costs of this court.

Reversed and remanded.

Chicago City Railway Company v. Thomas D. Mauger.

Gen. No. 12,591.

1. INSTRUCTION—*modification of, as to what jury may consider as law, improper*. While not held prejudicial error, an instruction as follows: "You should consider that only as law which has been given you by the court in the instructions," is improp-

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erly modified by being made to read: "You should consider that only as law which is not inconsistent with that given you by the court in the instructions."

2. IMPEACHMENT—*when written document competent by way of.* Contradictory statements in writing may be employed to impeach a witness where the written document containing such statements has been identified by him upon his cross-examination.

3. DECLARATIONS—*when competent, when not.* Declarations with respect to physical ailments, pain, etc., are competent where they form part of the *res gestae*; where, however, declarations are made with reference to an action pending or contemplated or under circumstances which charge them with suspicion, they should not be received as evidence.

4. MEDICAL EXPERT—to *what extent expert testimony of, should be limited.* A medical expert should be confined in his testimony to statements with respect to symptoms objective as distinguished from those of a subjective character.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed and remanded. Opinion filed October 9, 1906.

WILLIAM J. HYNES, J. W. DUNCAN and C. LeROY BROWN, for appellant; MASON B. STARRING, of counsel.

JEFFERSON D. RILEY, for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This case is before us a second time for review. The former judgment was reversed for reasons stated in the 105 Ill. App. 579. It being necessary to remand the cause for a new trial because of erroneous instructions, there was no occasion at that time to consider at length the conflict in the evidence. Upon a new trial with proper instructions and competent evidence, the presumption must be that the jury will correctly determine questions of fact.

It is contended in behalf of appellant that the present verdict and judgment are contrary to the manifest weight of the evidence; that the accident resulted

not from the alleged negligence of appellant, but from a want of ordinary care on the part of appellee. The plaintiff's version is that just before and at the time of the accident he drove south along Clark street, having the wheels of his wagon in the grooves of the street railway tracks, and that having reached his employer's place of business on that street he was backing away from the track in an effort to place the rear end of his wagon against the street curb between two other wagons, and that while thus engaged his wagon was hit by the approaching car, throwing him off and inflicting injuries complained of. On the other hand the defendant contends that the accident occurred because plaintiff suddenly and unexpectedly drove out from the curb and sidewalk directly in front of a car going south, which was then but a short distance away and which struck the corner of the wagon before the car could be entirely stopped. It is impossible within appropriate limits to review in detail the testimony relating to this controversy of fact. If it be true that plaintiff, appellee here, drove suddenly out from the sidewalk in front of the approaching car then only about forty feet away and put his wagon in front of and in contact with it before the car could be stopped in the use of reasonable care and effort by the motorman, it is evident the accident was not the fault of the defendant. We are inclined to the opinion that the greater weight of testimony tends to support this theory. Plaintiff's attorney urges that it is absurd to believe that with his wagon still empty plaintiff would suddenly drive out from the curbing in front of his employer's store without a load. This can scarcely be deemed conclusive, in view of the evidence to the contrary. Plaintiff may have wished to get into a better position for loading, or there may have been other reasons. It is, however, insisted in behalf of defendant that on either version of the facts plaintiff was guilty of contributory negligence in that he failed to look and did not attempt to ascer-

tain whether a car was approaching or not before he placed himself in a position of danger upon the track. The plaintiff testifies that he did look back over his shoulder, but failed to see anything within reasonable distance, and that he began to prepare to back in against the curb when someone shouted "look out," and the car was right upon him. There is no question that in the exercise of ordinary care it was his duty to ascertain whether a car was then so near as to create danger of a collision. The track was straight, the cars seem to have been moving slowly at the point of contact, and there is no question, so far as we can discover, that they must have been in plain sight and within "reasonable distance" at the time he says he looked back. There is evidence tending to show that the tracks were slippery or "gummy" by reason of weather conditions. The wagon was shoved a distance of perhaps eight feet by the mere weight of the car before both car and wagon were stopped, tending to show that there was no severe or violent collision. It is the plain duty of one driving upon a street car track in front of a car approaching, whether near or far, to exercise whatever reasonable care may be necessary to avoid being struck. There is evidence tending to show that in this respect appellee was not entirely free from blame.

It is urged that the court erred in modifying the second instruction given in behalf of appellant. As originally requested the instruction contained the sentence: "You should consider that only as law which has been given you by the court in the instructions." As modified it read: "You should consider that only as law which is not inconsistent with that given you by the court in the instructions." The modification is not an improvement. The jury cannot properly be allowed to speculate as to the law nor be governed by conjectures as to what is or is not inconsistent with the court's instructions.

It is urged that the court erred in excluding a written contradictory statement of a witness who was introduced by plaintiff. This witness testified on the stand that he judged the car was moving about twelve miles an hour and that it proceeded about twenty-five feet after striking the wagon before it was stopped. In an affidavit previously made the witness had stated that the speed of the car was at the rate of six or eight miles an hour and that it shoved the wagon eight or ten feet before it stopped, and also that the horse and wagon were at no time on the track or headed due south, from the time the affiant saw them until the accident occurred. This document was handed to the witness on his cross-examination by defendant's attorneys, and having identified the witness' signatures, one on each page, it was marked for identification. The court then said: "If you want to ask any questions about that you must use it before the witness goes away, if there is any explanation required of anything you examine him about." Subsequently when offered with the evidence of the defense, its introduction was objected to and the court ruled on objection by plaintiff's attorney that it could not be admitted unless counsel on both sides agreed, and the document was excluded. This ruling was, we think, erroneous. The document was admissible, as is said in *I. C. R. R. Co. v. Wade*, 206 Ill. 523-557, "not as substantive proof of the truth of such statements," (as it contained) "but as tending to discredit the witness." The foundation for its introduction for that purpose having been properly laid by questions to the witness on cross-examination by the defendant's attorneys, "the proper time to offer the paper as impeaching evidence would be when it came their turn to offer evidence. 1 Greenleaf on Evidence, section 463; 2 Phillips on Evidence, 963." *Peyton v. Village of Morgan Park*, 172 Ill. 102-106. There were other reasons why the document was material to appellant as tending to discredit the

testimony of this witness, who apparently alone testified that the motorman did not use the brake before the collision.

It is urged further that the court erred in admitting self-serving declarations and demonstrations made by the plaintiff to physicians. It appears to be undisputed that whether appellee was, as some of his witnesses declare, thrown with force from the wagon or stepped upon the shaft and slipped thence to the ground, there were no broken bones nor dislocations, and that the external indications of injury consisted mainly of bruises on the back, the right side and of some discolorations of the skin, which, however, was not broken. On the first trial plaintiff testified that the injuries alleged to have been suffered from the accident had destroyed his virility. This testimony it is said was given June 19, 1901. The last trial began June 15, 1905, in the course of which he testified that two children had since been born to him, one of whom was then about two and a half or not over three years old and the other a little over a year old. The evidence of the physician who attended at the births of these children shows the older one to have been born March 20, 1902, just nine months from the date when appellee testified that he was incapable of sexual intercourse. Under these circumstances it is evident that statements of appellee with regard to his physical condition as a consequence of the alleged injuries cannot be regarded as free from suspicion of being influenced by the pending litigation, whether made to a physician or anyone else. In *W. C. St. R. R. Co. v. Carr*, 170 Ill. 478, it is said: "We think, however, the correct rule to be deduced from that laid down by *Greenleaf* and most conducive to justice, is that such declarations being in favor of the party making them are only competent when made as part of the *res gestae*, or to a physician during treatment, or upon an examination prior to and without reference to the

bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant with a view to the trial." The court quotes with approval what was said in *Ill. Cent. Ry. Co. v. Sutton*, 42 Ill. 438-441, as follows: "A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily in forming his opinions be to some extent guided by what the sick person may have told him in detailing his pains and suffering. This is unavoidable and not only the opinion of the expert founded in part upon such data is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation and give it the character of *res gestae*." Other cases bearing upon this matter are *L. St. Elevated R. R. Co. v. Shaw*, 203 Ill. 39; *C. & E. I. Ry. Co. v. Donworth*, 203 Ill. 192; *Bates Machine Co. v. Crowley*, 115 Ill. App. 540; *McKormick v. West Bay City*, 110 Mich. 265; *Kath v. Wisconsin Cent. Ry.*, 99 N. W. Rep. 217. In the light of these decisions and upon principle, we are of opinion that an important part of the expert testimony produced in appellee's behalf should be deemed incompetent. A physician who never treated appellee, but who was employed to examine him solely for the purpose of testifying in his behalf at the trial, testified as to sensitiveness of the plaintiff in certain spots and impaired sensation on one side of appellee's person, which, according to his own evidence in the case, could undoubtedly have been simulated. The admission of the testimony of an expert physician whose examination of the plaintiff was made under such conditions for the express purpose of testifying in his behalf, is of doubtful propriety unless it is clearly confined to conditions such as are commonly called objective, or at least are such that the patient himself would be likely to have no voluntary part in

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exhibiting them or simulating ills that in fact do not exist. At all events, to permit such experts to testify to the existence of or loss of sensitiveness when his opinion is based wholly upon what the patient did and said in response to tests, and to permit him to relate what the patient told him, giving to it the weight of his supposedly skilled indorsement, is to make self-serving acts and statements of the patient more effectual in his behalf than they could otherwise be and to give them a fictitious value before the jury. We think the evidence of this character in the record which we need not take time to specify more in detail, admitted over appellant's objection, should have been excluded, and that motions to strike it out were erroneously denied.

It is unnecessary to follow counsel in the discussion of other points presented in the briefs. It follows from what has been said that the judgment must be reversed and the cause remanded.

Reversed and remanded.

Joseph I. Sheridan, Administrator, v. The Prudential Insurance Company of America.

Gen. No. 12,682.

1. **INSURANCE**—*clause providing for settlement by payment to person other than beneficiary, held valid.* A provision as follows:

"The company may make any payment provided for in this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same, by reason of having incurred expense in any way on behalf of the insured, for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons or other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been satisfied,—"

is valid, but settlement made thereunder will be closely scrutinized by the courts.

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Action of assumpsit. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Affirmed. Opinion filed October 9, 1906.

Statement by the Court. The facts of this case are substantially set forth in an agreed statement to the effect that on the 27th of July, 1903, appellee issued its policy of insurance on the life of George De Quetterville, which policy provides that the amount of the benefit shall be paid to the executors, administrators or assigns of the insured, unless settlement shall be made as provided in article two under the head of "Provisions;" that De Quetterville died April 24, 1904; that all of the premiums due and payable by the terms of the policy were paid by said De Quetterville to the date of his death; that at the time the policy was issued, the deceased was boarding at the house of one Kate Miller and so continued until his death; that after such death said Kate Miller presented written proofs of death to appellee, which are introduced in evidence, claiming to be entitled to the benefits under said policy, because she had incurred expense on account of the burial of said deceased and because at the time of death he was indebted to her for board; that when presenting said proofs she surrendered therewith the said policy of insurance and premium receipt book pursuant to the rules of the appellee; that she also at that time showed the agent of the appellee a receipt to her for the cost of the grave of said deceased and a bill rendered to her by the undertaker for the funeral expenses of said insured amounting to \$81; that said bill has not been paid and that at that time it was said Kate Miller's intention to pay the same out of the proceeds which she might recover on said policy; that said undertaker is now claiming the amount of said funeral expenses from the administrator, appellant herein, and is making no claim for same against said Kate Miller; that after

receiving said proofs of loss and claim from said Kate Miller, the defendant company by its agents made inquiry concerning the physical condition of said De Quetterville for some time prior to his death and at the time of the issuance of the said policy, and thereafter refused to pay the said policy, claiming that it was not liable thereon because of the physical condition of the said De Quetterville at the time of its issuance; and thereupon notified said Kate Miller that it would not recognize said policy as binding upon it, but that it would return to the said Kate Miller all premiums which had been paid upon the said policy in full settlement of all claims thereunder, and that after considerable negotiating with said Kate Miller, she accepted said offer and said company paid to her and she accepted \$3.35, the amount of the premiums which had been paid on the said policy, in full settlement of all claims and demands under said policy; and she thereupon executed her receipt for said \$3.25 in which it is stated that such "payment is in full for all claims against said company under policy No. 17,997,290 issued upon the life of George De Quetterville," and is signed by said "Mrs. Kate Miller."

It is further agreed that at the time defendant offered to return to said Kate Miller the \$3.25 premiums paid, the agent of the defendant company making said offer stated to her that if she did not accept this proposition she would never receive a cent.

The said insurance policy, which is for \$170, was introduced in evidence, showing that at the time of death, being more than six months after its date, one-half of said sum, \$85, was due, and containing a clause providing for payment to the personal representatives of deceased, unless settlement should be made in accordance with article second, under head of "Provisions," which is as follows:

"2d. FACILITY OF PAYMENT. The company may make any payment provided for in this policy to

any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same, by reason of having incurred expense in any way on behalf of the insured, for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons, or other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been satisfied."

The cause was submitted to court without a jury, a jury having been by agreement waived. The Superior Court found the issues for the defendant.

JOHN T. MAHON, for appellant.

HOYNE, O'CONNOR & HOYNE, for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is contended in behalf of appellee that said clause 2nd, quoted in the foregoing statement, fully authorized the selection of Kate Miller as the beneficiary under said policy and that the settlement with her is a complete defense to a suit by the administrator of the estate of the insured. The argument is that the parties to the policy had the right to enter into any contract not prohibited by law, and that this contract authorizing the selection of one of several parties to whom payment could be made, contravenes no law and it is not against public policy; that it is a matter with which the public is in no way concerned. In support of those contentions we are referred to the following cases: *Brennan v. Prudential Ins. Co.*, 32 Atlantic Reporter (Pa.), 1042; *Thomas v. Prudential Ins. Co.*, 148 Pa. St. 597; *Thomas v. Prudential Ins. Co.*, 158 Ind. 461; *Metropolitan Life Ins. Co. v. O'Farrell*, 64 Kan. 278;

Brooks v. Met. L. Ins. Co., 70 N. J. L., 36; Metropolitan L. Ins. Co. v. Schaffer, 50 New Jersey Law, 72.

In the first of the above cited cases the action was brought by the administrator of the insured, upon policies which contained the clause above referred to found in the policy now in question. A settlement was made with a party selected by the insurance company under that clause, who was paid less than one-half the face of the policy. The Supreme Court of Pennsylvania affirmed the judgment of the trial court and approved the opinion of that court in reference to that clause, a portion of which is as follows:

“The clause which is thus brought under consideration, and which appears in all the policies of the defendant company, was passed upon by the Supreme Court in *Thomas v. Insurance Co.*, 148 Pa. 594, and was sustained in its entirety. It was there held that in accordance with the express terms of the contract between the parties, the payment of the money by the company to the person appearing to it to be entitled to it, is a complete defense to a suit by the personal representative of the insured; that it is for the company to determine who is the person so entitled; and that it does not matter whether the person selected is in fact entitled to the money, it being sufficient that he or she appears to the company to be so. The principle of the decision virtually controls this case. The only difference between the two cases is that here the company paid but a part of the money and set up this to bar the whole. This, it is contended, does not fall within the strict terms of the policy, because it is only the payment of the amount named in the policy, and the production of a receipt for that full amount, that is to work satisfaction. To allow of anything less than this, it is argued, is to invite fraud. If the company may select their own party, and settle with him on their own terms, they can pick up anybody, and discharge themselves with a mere song. While this is not

without considerable force, yet the decision quoted, if followed to its legitimate end, is against it. If the company may select the person whom they consider to be equitably entitled to the insurance money, with whom to settle, it cannot matter to anyone else upon what terms a settlement is reached. There may be subjects of controversy which call for adjustment and compromise, and to say that the company must pay the full amount of the insurance, or be debarred from taking advantage of this clause, is to interfere with the right of compromise, as well as their contract rights under the policy. Neither is it of any avail to inquire into the reasons which brought about a settlement, if the parties are competent to make it. Every compromise involves mutual concessions, and even if they seem to others to be unwarranted, there is no power in a third party to undo them. If, therefore, the company may determine to whom they will pay, they may also make their own terms with him, and if he sees fit to take fifty cents on the dollar, or any other sum, in settlement of the amount insured, it concerns no one but himself and the company are discharged.

It may be well to add, however, that in what is thus said we intend to speak only of a settlement made in good faith, in an honest effort to meet and discharge the obligations of the contract, and not in an attempted evasion of them. What would be the result in any case if settlement was shown to be of the latter character, we are not called upon to determine. But it may not be out of course to say, in response to the plaintiff's argument, that a settlement for a very much less sum than the face of the policy, arbitrarily made with a third party having no connection with the transaction, merely to escape a greater liability, would be charged with such bad faith, if not fraud, that it could not well stand. Nothing of that kind appears, however, in the present instance."

In *Thomas v. Prudential Ins. Co.*, 148 Pa. 594-598,

referred to in the above citation, the apparent object of this kind of insurance contract is said to be to provide for necessary expenses at the last sickness or death of the insured; and the "manifest object" of the clause under consideration is said to be to "enable the company in case of the death of the assured to pay the amount of the policy without the expense of an administration. * * * The company paid this money to the person appearing to it to be equitably entitled thereto, and produced a receipt signed by her for the same. This was a complete defense under the very terms of the policy. It is for the company to judge who is the person to be equitably entitled to the money. This discretion is vested in it by the contract between the parties. The contract itself does not offend against any rule of law or public policy, and we can not hold that the administrator is entitled to recover without making a new contract for the parties."

Similar contracts are sustained by the courts of Indiana, Kansas and New Jersey in cases above cited, in some of which reference may be found to still other cases. In the opinion of a majority of the court these authorities must control the determination of the case before us, and it must be held that the payment to Kate Miller and the production of her receipt stating that the payment made to her is "in full for all claims against said company under" the policy in controversy, is to be regarded as a complete defense to the present suit by the administrator of the estate of the deceased.

It is contended in behalf of appellant that even if the clause referred to be held valid and binding, it must be strictly construed and that any and all settlements with a beneficiary appearing to the company to be entitled to payment, must be such and such only as are strictly within the meaning of the provision authorizing such payments. In the present case it appears from the agreed statement of facts that the company denied all liability under the policy, because, as was

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claimed, the insured at the time he obtained it was not "in sound health," and hence the contract was by its terms invalid. The company refused, therefore, to recognize the policy as binding, but told Mrs. Miller that it would return to her all the premiums it had received from the deceased in full settlement of claims under it. There is no evidence in the record tending in any way to show that the insured was not in sound health at the time the policy issued. No presumption of that kind can be indulged in the absence of evidence. The material fact is, however, that the company repudiated the policy entirely and denied that it ever was an obligation binding upon it. The return of the premium was not a "payment provided for in this policy," and it is only in case of such payment to a relative or connection of the insured or to a person "appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial or for any other purpose," that the receipt of the payee is by the clause in question made "conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under the policy have been satisfied." The writer is of the opinion that it is clear the alleged settlement with Mrs. Kate Miller was not a settlement under the policy itself, or such a settlement as article 2nd contemplates. It was outside of the provisions of the policy entirely, and emphasizes the repudiation of the policy in all its parts by the company. It is difficult to see how the provisions of a repudiated contract can be invoked to support a release of liability only available under such contract. A compromise of an amount due under a policy is different from a repudiation of it entirely and a refusal to pay anything under it. The act of the company appears to the writer to be merely a gift to a person of its own selection of the \$3.25 it had received, not from her but

from the insured. It had about the same relation to the terms of the policy as if the company had thrown the money into the street for anyone to pick up who might find it. A repudiation of the entire contract the writer deems inconsistent with a claim to be entitled to escape liability under its terms. If the validity of clause 2 be conceded, the company should be held to strict compliance with such provision of its own making.

The writer is further of the opinion that where, as here, it clearly appears that there is a bill due to the undertaker for burial expenses of the insured as well as for board and other things to another, a compromise for less than the amount due under the policy with one only of those clearly appearing to the company and everyone else to be alike equitably entitled to be paid by reason of having incurred expense for the illness or burial of the insured, is not such a reasonable exercise of the option given the company under the policy as would alone suffice to relieve it from liability for the balance of the insurance money to others equally and unquestionably entitled equitably to share in the fund. The clause in question clearly contemplates payment not only "to the person," but to the "persons entitled thereto." The writer is of opinion that the clause referred to is itself of such a questionable nature, so susceptible of fraudulent abuse, that settlements made under it should be carefully scrutinized by the courts when cause appears.

Inasmuch, however, as the majority of the court regard the cases above referred to as controlling the case before us under the facts, the judgment of the Superior Court will be affirmed.

Affirmed.

Chicago City Railway Company v. Almon Cooper, by next friend.

Gen. No. 12,685.

1. **PASSENGER**—*when carrier liable for assault upon.* A carrier is liable for an assault committed upon a passenger by a servant of such carrier where such servant is acting within the line of his duty or within the scope of his employment; but in the absence of proof that such servant in making such assault was acting within the line of his duty, no presumptions will be entertained to supply the absence of such proof.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed, with finding of facts. Opinion filed October 9, 1906.

WILLIAM J. HYNES, JOHN E. KEHOE and C. LEROY BROWN, for appellant; MASON B. STARRING, of counsel.

THEODORE G. CASE and JOHN T. MURRAY, for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellee recovered a judgment in the Superior Court for personal injuries alleged to have been received in consequence of an assault made upon him by a motorman in the employ of appellant. From that judgment this appeal is prosecuted.

The action is trespass on the case. The declaration avers that "a motorman or driver of the said car, wrongfully, improperly, wantonly and unlawfully and without any just cause, assaulted and violently beat said plaintiff and with unlawful and excessive force and violence pushed and threw him off and out of said car to and upon the said tracks and the ground thereunder and about the wheels of said car." Appellant's

contention is that the boy, who was selling papers, was not pushed, but fell off the car in such a way as to get his left leg under the wheels, and that there was no motorman on the car from which he fell.

Appellee was a boy between thirteen and fourteen years of age when the accident occurred. His version of the occurrence is that, on the last day of April of that year he was selling papers at the corner of Eighteenth street and Wabash avenue, Chicago, and was run over about four o'clock in the afternoon of that day; that he "went to get on" an Indiana avenue electric car after it was coupled to a Cottage Grove avenue cable train at that point; that the motorman of the Indiana avenue car "has to get off there and wait until this car goes around the loop and comes back;" that as appellee was getting on, the motorman was getting off the car, that he had "the propeller in one hand and those little sticks that he uses to operate the sand brakes and bell," that is, the controller handle and the bell plunger, and the "large lever, the thing that works back and forth to push the brake;" that appellee had one foot on the bottom step and was about to put his other foot on the higher step when the motorman "grabbed" him with his right hand and shoved him off, using profane language and giving him a kind of twist so that he fell "in kind of a whirl;" that appellee had three "Journals" under his arm; that he does not remember any more until the car had run over his leg; that when he was thrown off his left leg went under the front wheel or wheels of the car, which was brought to a standstill before the hind wheel reached him. He states that he was not getting on the car to sell papers and that he had a nickel in his hand; that he was going down town to buy the five o'clock "News," to get which he says he would "have to be there between three and four o'clock;" that his leg was amputated a little over six inches below the knee.

Appellant's version of the accident is that the train which inflicted the injury consisted of a grip-car and two Cottage Grove avenue trailers, neither of which was equipped with electrical devices and upon which there was no motorman at all; that neither a motorman nor any train man had anything to do with the accident, and none was standing on or coming from the platform of the car which appellee attempted to board; that the boy got on to the front platform of a Cottage Grove avenue trailer car, the last car in a north-bound cable train, and that he jumped off this platform backward; that the train was in motion at the time he boarded it and when he jumped from it, and that as he jumped he slipped and fell with one leg partly under the wheels of the car; that the jar of the car wheels passing over his leg was noticed by the conductor of this rear car, who immediately signalled for an emergency stop; that the train was brought to a standstill so that its rear end was from twenty-five to fifty feet north of the point where the boy was lying.

That the evidence greatly preponderates in favor of appellant's main contention, cannot be questioned. There are three witnesses who testify in appellee's favor, including the plaintiff himself. The material testimony of these three is contradicted by an overwhelming number of apparently disinterested witnesses. That the injury was not inflicted by an Indiana avenue or by any electric car, that no such car was attached to that train and that it was an ordinary trailer on a Cottage Grove avenue cable train from which the boy fell and which ran over his leg, a car in which several of the witnesses were passengers from points many blocks south of Eighteenth street, is the uniform testimony of witnesses, whose evidence it is impossible to disregard. The importance of this evidence is that the trailer was not equipped with electric appliances, had no motorman to operate it and no occasion for one, and

that the boy could not therefore have been seized by any motorman of the car by which he was injured and been thrown off under the wheels, as he claims. The evidence overwhelmingly preponderates that he slipped or lost his hold when swinging off the car in a manner not unusual with newsboys seeking to sell papers on these cars, and that he was not seized or thrown or pushed off the car by anyone.

If, however, we accept the plaintiff's version of the accident, it would appear that he was seized by a motorman of an Indiana avenue electric car on said car, which had just been attached to a Cottage Grove cable train on the point of proceeding on its way; that this motorman had removed his appliances for operating an electric car, and having finished his duties was leaving the train; that although his duties on that car had ended, yet without any apparent motive he seized appellee and with a curse threw him off the car, giving him a twist which sent the boy under the wheels. According to this version the alleged act was done without cause or provocation by an employe not then on duty nor in the performance of any duty to his employer. There is no averment in the declaration to the effect that the boy was or was intending to become a passenger, nor that he was lawfully upon the car. The statement is that he was a minor "then and there being on and upon the said street car." He testified, however, that he was going to the "News" office to get papers to sell, and had a nickel in his hand to pay his fare. His evidence in this respect, while discredited by undisputed evidence, tends, nevertheless, to show that he was getting on the car with the intention of becoming a passenger. For a wilful trespass by a servant upon a passenger the carrier is responsible, if the servant is "acting within the line of his duty or within the scope of his employment. The law cannot assume, at least, as to a subordinate employe on a train, who is not entrusted with the general management and con-

trol of it, that he has control over passengers or persons attempting to ride or that he is entrusted by his employer with authority in respect to them, to eject them, and it was necessary to make the proof." I. C. R. R. Co. v. King, 179 Ill. 91-95. There is in the case at bar no averment in the declaration that the defendant assaulted or injured the plaintiff and no averment and no proof that the alleged wrongful act of the motorman was within the line or scope of his employment. If a passenger, appellee was entitled to protection "against personal injury from the agents or servants of appellant in charge of the train." C. & E. I. R. R. Co. v. Flexman, 103 Ill. 546-552. There is not only no proof that this alleged motorman was in any sense in charge of the train or the car, but it is clear from appellee's evidence that the motorman he describes was not so in charge nor responsible for it in any sense, at the time of the alleged occurrence. In C., R. I. & P. Ry. Co. v. Brackman, 78 Ill. App. 141-147, a case in which the general subject of liability for an unauthorized act of an employe is fully considered, it is said by Justice Dibell of the Second District: "In such an act outside his employment the servant no longer represents the master and is not acting for him, but of his own volition. * * * No person could safely employ another in any business, however humble, if he was held responsible for all acts of the servant during the period of the employment, where the acts were not authorized and were outside the duty he was hired to perform." See also C. & W. I. R. R. Co. v. Ketchem, 99 Ill. App. 660-664; Mogk v. Chicago C. Ry. Co., 80 Ill. App. 411-416; Dixon v. Northern P. R. R. Co., 68 L. R. A. 895-898.

The judgment of the Superior Court must be reversed with a finding of facts.

Reversed with finding of facts.

**Independent Brewing Association v. Michael Schaller,
Administrator.**

Gen. N.J. 11,683.

1. *RES IPSA LOQUITUR*—*what essential to application of doctrine of.* In order that the doctrine of *res ipsa loquitur* may be applied, it must appear that the thing causing the accident was under the control of the defendant or his servants.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed, with finding of facts. Opinion filed October 9 1906.

LOESCH BROTHERS & HOWELL, for appellant; ALBERT B. FORCE, of counsel.

J. HENRY KRAFT, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment recovered by the administrator of Leonhart Schaller in an action for wrongfully causing the death of plaintiff's intestate.

Defendant in 1897 owned and operated a brewery. In a room in the basement of the brewery were five cylindrical iron tanks, each 23 feet high and 17 feet in diameter. In the top of each tank was a hole 3½ inches in diameter, and on the side, near the bottom, was another hole through which a man could pass.

Theodore Winkofsky made a contract with the defendant in December, 1897, to varnish said tanks on the inside, and Winkofsky employed plaintiff's intestate and one Louis Emme to work with him in varnishing said tanks. The defendant furnished to Winkofsky the varnish and two electric extension lights, but only one light was used in a tank. The three men had been en-

gaged in this work three weeks when the accident occurred, had varnished four tanks and were then putting the last coat on the floor and lower part of the sides of the fifth tank. In this work they stood upon the iron floor of the tank.

Alcoholic vapor given off from the freshly varnished surface of the tank, mixed with air, filled the tank with an inflammable and explosive gas which was in some manner set on fire and an explosion occurred, by which Winkofsky and both of his employes were so burned that they died in a few hours. The lamp and appliances so furnished by the defendant and in use in the tank at the time of the accident, consisted of an incandescent lamp and a lamp cord twenty-five feet long. The cord was made up of two cords twisted around each other. In the center of each was a wire which carried the current, and such wire was covered by insulating material in the usual manner. An end of this twisted or double cord was connected with an electric light wire at a socket near the top of the tank. The cord passed into the tank through the hole in its top, and to the other end of it was attached the lamp. The defendant furnished, and directed Winkofsky to use, a guard made of wire that fitted over the glass bulb of the lamp to protect it from injury, but this guard was not on the lamp at the time of the accident.

The negligence charged and relied upon as a ground of recovery is, that the defendant negligently failed to provide a light for said tank that was reasonably safe, and that the accident was the direct result of such negligence. There is neither charge nor proof that the existence of such inflammable and explosive gas in the tank was the result of any negligence on the part of the defendant. The men who were in the tank were all killed, and there was no direct evidence as to the manner in which the gas was set on fire.

The contention of appellant that the risk was assumed by plaintiff's intestate, cannot be sustained.

Plaintiff's intestate was not the servant or employee of defendant. Assumption of risk is a matter of contract, between master and servant, and there is in this case no question of assumption of risk.

Although there was no contractual relation between defendant and plaintiff's intestate, out of the facts and circumstances arose a duty on the part of the defendant to plaintiff's intestate. Defendant made a contract with Winkofsky, to perform which Winkofsky and his employes must go into defendant's tanks. It was known that there was danger that in varnishing a tank it might become filled with an inflammable and explosive gas, and when defendant contracted to furnish an electric lamp and appliances to light the tanks, it became his duty to use reasonable care to furnish a lamp and appliances reasonably safe for that purpose.

To show a right of recovery in this case the plaintiff was bound to prove facts from which the jury might properly find, first, that the defendant was guilty of negligence in respect to the electric light which was in the tank at the time of the explosion, and second, that the gas in the tank was set on fire by a spark caused or produced through or by means of such electric light as the result of such negligence.

The contention of appellee is, that proof that the gas in the tank ignited and exploded, is *prima facie* evidence of negligence on the part of the defendant.

It may well be doubted whether, in this case, proof of the ignition and explosion of the gas would be *prima facie* evidence of the negligence of the defendant, if the tank and light had been under the exclusive control of the defendant.

In *John Morris Co. v. Southworth*, 154 Ill. 118, in an action by a landlord against a tenant, it was held that the explosion of a steam boiler, leased as part of the premises and used by the tenant, was not of itself *prima facie* evidence of the tenant's negligence. The decision is put upon the ground that the tenant's lia-

bility, under the facts of the case, is not to be determined by the rule of negligence governing the case of common carriers of passengers or goods. The tenant in that case, like the defendant in this case, was bound to exercise only reasonable care.

But a fatal objection to the application of the doctrine contended for, the doctrine of *res ipsa loquitur*, in this case is, that it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the electric lamp and its appliances in this case were not under the control of the defendant or its servants. Thompson on Negligence, Sec. 7,635. Here the defendant only furnished the lamp, its appliances and the current. Winkofsky and his servants had the control of the lamp, and they only were in the tank when the explosion occurred.

The cause of the explosion is left by the evidence a matter of conjecture, suspicion, or surmise.

When an incandescent lamp is lighted, the filament of carbon in it is heated to a white heat and by the breaking of the bulb the filament would be exposed and the gas might be ignited. But there is no evidence that the gas in this case was ignited by the breaking of the bulb, and if it was so ignited the bulb may have been accidentally broken by one of the men in the tank, or collapsed because of a latent defect.

So if the insulation of both cords which carried the wires became abraded or defective, and the wires touched or crossed each other, a "short circuit" would be formed and sparks given off which would ignite gas. But there is no evidence that any lamp cord was abraded, any wire exposed, or that any "short circuit" was formed, and the fact that the fuse at the socket where the lamp cord was attached to the electric light wire of the building, was not burned or blown out, tends to show that no "short circuit" was formed.

But any spark or flame, no matter how produced, would ignite the gas as well as a spark produced by a

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“short circuit,” and with three men working in an iron tank, upon an iron floor, a spark or flame might be produced in various ways.

Upon a careful review of the evidence we cannot escape the conclusion, that taking as true the testimony most favorable to the plaintiff, and as proven, the evidentiary or probative facts most favorable to the plaintiff which there is evidence fairly tending to prove, the evidence is not sufficient to warrant or support a finding by the jury that the defendant was guilty of the negligence charged in the declaration, or that the death of plaintiff's intestate was caused by any negligence of the defendant.

The judgment of the Circuit Court will be reversed with a finding of facts.

Reversed with finding of facts.

Peter Fortune v. William J. English.

Gen. No. 12,117.

1. STATUTE OF LIMITATIONS—*what fraudulent concealment within meaning of section 22.* Fraudulent concealment of a cause of action from the knowledge of the person entitled thereto to prevent the running of the Statute of Limitations under the section referred to, must be something of an affirmative character; something said or done with the fraudulent purpose to conceal such cause of action from the person entitled thereto and which was calculated to conceal and has the effect to conceal such cause of action. Mere silence by the person liable to the action, is not a concealment within the meaning of the statute.

Action of assumpsit. Appeal from the Circuit Court of Cook county; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed October 9, 1906.

Statement by the Court. This suit was begun February 14, 1900. The declaration as amended con-

sists of the following counts: original counts one, two, three and four; amended additional counts five, six, seven and eight; additional counts nine and ten. To amended additional counts five, six, seven and eight a demurrer was sustained. To the first four counts the defendant pleaded the following pleas: first, not guilty; second, the five years' Statute of Limitations; third the ten years' statute. To the ninth and tenth counts he pleaded: first, not guilty, second and fifth, the five years' statute, and third and fourth, the ten years' statute. To the second plea to the first four counts the plaintiff filed four replications; the first, a traverse, was withdrawn and the third and fourth were amended. To the third plea to said counts plaintiff filed three replications, the first of which, a traverse, was withdrawn. To the replications not withdrawn to said second and third pleas the defendant demurred. Upon stipulation it was ordered that the second and third and fourth amended replications to said second plea stand as replications to the second and fifth pleas to the ninth and tenth counts, and that the demurrer to said replication to said second plea stand as a demurrer to the same, as replications to said second and fifth pleas to the ninth and tenth counts; that the second replication and third amended replication to the third plea to the first four counts stand as replications to the third and fourth pleas to the ninth and tenth counts and that the demurrer to said replications to said third plea stand as a demurrer to the same as replications to the third and fourth pleas to the ninth and tenth counts. The court sustained said demurrers to said replications, and the plaintiff electing to stand by the same and by said ninth and tenth counts, there was final judgment for the defendant, from which the plaintiff prosecutes this appeal.

HIRAM T. GILBERT, ALEXANDER SULLIVAN and FRANK L. KRIETE, for appellant.

KRAUS, ALSCHULER & HOLDEN, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

In the brief for appellant it is said that "the essential point which the court is called upon to decide and which is decisive of the case, is presented by the demurrer to the amended fourth replication to defendant's second plea to the first, second, third and fourth counts." The sufficiency of this replication is the only question discussed in the brief for appellant and is the only question we deem it necessary to consider.

The declaration alleged that in 1889 plaintiff employed defendant, an attorney at law, to act as his attorney and legal adviser in the purchase of certain real estate which was subject to two certain trust deeds in the nature of mortgages executed by the owner thereof to one Isaac E. Adams, trustee, to secure her promissory notes; that there was presented to plaintiff a deed of conveyance of said real estate executed by the owner and release deeds of said trust deeds executed by said Adams as such trustee, and that defendant negligently, etc., advised plaintiff that such release deeds of Adams released and discharged said trust deeds, although the notes secured by said trust deeds were not in the possession of Adams and were not canceled or surrendered, and that relying upon such advice plaintiff accepted said deeds, paid the purchase price of said real estate and afterwards was compelled to pay the amount of said notes by said trust deeds secured.

That the cause of action accrued when the breach of duty set up in the declaration occurred, and that such cause of action was by the terms of the statute barred in five years, although the plaintiff was ignorant of its existence, unless such cause of action was "fraudulently concealed" by the defendant from the plaintiff, is conceded, and the question presented is, whether said amended fourth replication sufficiently avers that

the defendant "fraudulently concealed" from the plaintiff the cause of action set up in the counts to which said second plea was pleaded.

Section 22 of our Statute of Limitations provides as follows: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

Said replication is as follows:

"And for an amended further and fourth replication filed by leave of court to the said plea of the said defendant by him secondly above pleaded to the first, second, third and fourth counts of the plaintiff's declaration, the said plaintiff says *precludi non*, because he says that the plaintiff as well at the time of the committing of the grievances in the declaration mentioned as during all the time thence hitherto was unlearned in the law and wholly incompetent and unable to determine for himself the matters in the declaration and hereinafter mentioned, concerning which the defendant advised the plaintiff as in the declaration and hereinafter is alleged, and that the defendant for more than ten years prior to the committing of said grievances in the declaration mentioned, was and thence hitherto has been an attorney and counsellor at law, during all of which time the said defendant held himself out to the plaintiff as being learned in the law and capable of correctly and properly advising the plaintiff with respect to the matters in the declaration mentioned and hereinafter mentioned, and during all of which time the defendant for hire and reward in that behalf was employed by the plaintiff as an attorney and counsellor at law to advise and direct the plaintiff with respect to the matters in the declaration and hereinafter mentioned, by reason whereof it then and there became and was the duty of the defendant to act in good faith towards the plaintiff and to use due care and diligence to correctly advise the plaintiff respect-

ing the matters aforesaid in the declaration and hereinafter mentioned.

“And the plaintiff further avers that from the time of the committing of the grievances in the declaration mentioned down to a time within less than five years prior to the commencement of this suit, to wit, down to the ninth day of December, A. D. 1899, the plaintiff was and remained ignorant and wholly without knowledge or notice of the committing by the defendant of the grievances in the declaration mentioned.

“And the plaintiff further avers that on, to wit, the eleventh day of September, A. D. 1893, and within less than five years after the committing by the defendant of the said grievances in the said declaration mentioned, the plaintiff being then and there still ignorant of the committing by the defendant of the said grievances, one Bayard Stockton and another, claiming to be the holders and owners of the said promissory notes in the declaration mentioned, instituted in the Circuit Court of said Cook county a suit in chancery against the plaintiff and other persons, alleging that the said promissory notes in the declaration mentioned were then still unpaid, and praying, among other things, for a decree of foreclosure and to subject the said real estate to sale, as provided by law for the payment of the amount which might be found by said court to be due the complainants in said suit upon the said promissory notes in case the amount so found to be due should not be paid by the plaintiff or other defendants named in said suit, in which said suit process of summons was then and there duly served upon the plaintiff by the delivery to the plaintiff by the sheriff of said Cook county of a copy of the said summons.

“And the plaintiff further avers that the plaintiff, upon receiving said copy of said summons, then and there brought the same to the notice of the defendant and then and there retained and employed the defendant for hire and reward in that behalf, as an attorney and counsellor at law to investigate the said suit and the questions of law and fact connected therewith and bearing upon the rights and liabilities of the plaintiff with respect to the said promissory notes, trust deeds

and said real estate, and to direct the plaintiff as to the course proper to be pursued by the plaintiff with respect to the said claims of the complainants in said suit, by reason whereof it then and there became and was the duty of the defendant to act in good faith towards the plaintiff and to use due care and diligence to advise the plaintiff respecting the matters aforesaid connected with said suit.

“And the plaintiff further avers that defendant then and there, well knowing that he, the defendant, had been guilty of the committing of the grievances in the declaration mentioned, and that he, the defendant, was then and there liable on account thereof to the plaintiff in damages to a large amount, to wit, to the amount of Twenty Thousand Dollars (\$20,000), and that the plaintiff was then and there ignorant of the law and of the committing by the defendant of the said grievances and of the liability of the defendant to the plaintiff on account thereof and craftily and fraudulently intending to conceal from the plaintiff the committing of the said grievances and to prevent the plaintiff from bringing suit against the defendant on account thereof within five years after the time aforesaid of the committing of the grievances aforesaid, falsely and maliciously represented to the plaintiff that the plaintiff, notwithstanding the claims of the complainants in said suit in chancery aforesaid, was the owner in fee simple of the real estate, free from all encumbrances, and that the plaintiff, by following the advice and direction of the defendant, could successfully defend said suit and defeat the claims of said complainants therein.

“And the plaintiff further avers that the plaintiff, not knowing to the contrary, but implicitly relying upon the truth of the said representations aforesaid, and acting under the direction and advice of the defendant, defended said suit until, to wit, the ninth day of December, 1899, at which time the same was finally decided adversely to the plaintiff and until which last mentioned date the plaintiff remained wholly ignorant of the committing by the defendant of the said grievances in the declaration mentioned.

“And the plaintiff further avers that after deduct-

ing from the period from the committing of said grievances in the declaration mentioned by the defendant to the commencement of this suit the time during which the committing of the said grievances was fraudulently concealed as aforesaid by the defendant, there remained a period of less than five years."

The fraudulent concealment of a cause of action from the knowledge of the person entitled thereto, to prevent the running of the Statute of Limitations under the provision above quoted, must be something of an affirmative character; something said or done with the fraudulent purpose to conceal such cause of action from the person entitled thereto and which was calculated to conceal and has the effect to conceal such cause of action. Mere silence by the person liable to the action, is not a concealment within the meaning of the statute. *Parmelee v. Price*, 208 Ill. 544-561; *Milner v. Powers*, 119 Ind. 79.

There is in the replication no averment that defendant fraudulently concealed from plaintiff any fact in relation to the purchase of said land by the plaintiff, nor that the defendant knew any fact in relation thereto which was not known to the plaintiff. Both knew that the notes secured by the trust deeds were not in the possession of Adams, the trustee, when he executed the release deeds and that they had not been surrendered or canceled. Nor is there any allegation that the defendant made any false statement of a fact to the plaintiff with intent to fraudulently conceal from him the existence of a cause of action against the defendant. It is true that the replication avers that when the foreclosure suit was brought against the plaintiff in 1893 and he employed the defendant to defend the same, defendant "falsely and maliciously" represented to plaintiff that the plaintiff was the owner of said real estate, free from encumbrance, and could successfully defend against said bill to foreclose. This statement was only the statement of the legal opinion of the defendant upon facts equally well

known to plaintiff and defendant and cannot under the averments of the replication be held to be a false statement of a fact made with the intent to fraudulently conceal from the plaintiff the existence of a cause of action against the defendant. We do not find in the replication any averment of a fact or facts that in our opinion amounts to an averment that the defendant fraudulently concealed from the plaintiff the cause of action set out in the declaration, or of a fact or facts that estop the defendant from pleading the Statute of Limitations to any count of the declaration.

We think the Circuit Court did not err in sustaining plaintiff's demurrers to the replications and to the counts to which demurrers were sustained, and the judgment will be affirmed.

Affirmed.

William A. Kjellman v. Scandia Fish Company.

Gen. No. 12,594.

1. CORPORATION—*what essential to establish liability against, for refusal to transfer stock certificates.* In order to enforce liability against a corporation for refusal to transfer a stock certificate, it must appear that the person seeking to maintain such action has strictly complied upon his part with all the by-laws and regulations pertaining to the right to have such transfer.

Action on the case. Appeal from the Superior Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Affirmed. Opinion filed October 9, 1906.

Statement by the Court. This is an appeal by the plaintiff from a judgment on a directed verdict for the defendant in an action on the case to recover damages for the alleged wrongful refusal of the defendant to transfer certain shares of the capital stock of the defendant to the plaintiff and issue to him new certificates for said shares.

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The defendant corporation issued to Louis Garswick the following stock certificate:

"This certifies that Louis Garswick is the owner of twenty shares of fifty dollars each of the capital stock of Scandia Fish Company, fully paid and non-assessable, transferable only on the books of the corporation by the holder hereof, in person or by attorney, upon the surrender of this certificate properly endorsed."

It also issued to John Iverson two similar certificates, one for twelve, the other for eight shares of its stock.

Garswick indorsed upon his certificate over his hand the following:

"For value received, I hereby sell, assign and transfer unto Wm. A. Kjellman shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint Wm. A. Kjellman attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises."

Iverson made a similar indorsement on each of his certificates, and said certificates so indorsed were delivered to the plaintiff.

November 29, 1902, plaintiff sent said Garswick certificate with said indorsement thereon to the defendant, with the following letter:

"SCANDIA FISH COMPANY, Chicago, Ill.

GENTS:—Enclosed please find cert. No. 13 for 20 shares of your stock which has been transferred to me. Kindly issue new certificates in my name as follows:

1 cert. of 10 shares,	10 sh.
1 " " 5 "	5
5 " " 1 " each,	5 ."

December 9, 1902, plaintiff sent said Iverson certificates to the defendant with the following letter:

"JOHN P. LARSON,

Sec. & Treas. Scandia Fish Company,
Chicago, Ill.

DEAR SIR:—Enclosed please find certificates Nos. 18

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and 19 respectively for 12 and eight shares of the capital stock of your company for which kindly issue and send me new certificates in my name, and have the transfer registered on the books of the company.

I desire the entire 20 shares on *one* certificate."

Garswick and Iverson had each paid but fifty per cent. \$500, for his twenty shares of stock. In answer to plaintiff's letter first above quoted defendant wrote plaintiff as follows:

"CHICAGO, Dec. 2nd, 1902.

WM. A. KJELLMAN,
116 W. Randolph St., City.

DEAR SIR:—Before we cancel certificate No. 13 and issue new certificate to you according to your favor of Nov. 29th, we wish to notify you that the 20 shares are only paid to the extent of 50%. We presume that you are aware of this fact from the investigations you claimed to have made some time ago. As you are aware a special meeting is called for Dec. 11th, to reduce the capital stock. You have undoubtedly received due notice of said meeting. If this reduction is made, then, of course, it will be necessary for you to reduce your stock to one-half or else pay it up in full. We wish to advise you about these matters in time. Please notify us as to your further pleasure as to this matter."

To which plaintiff replied as follows:

"CHICAGO, Ill., Dec. 3rd, 1902.

SCANDIA FISH Co.,
171 W. Randolph St., Chicago, Ill.

GENTS:—Replying to yours of yesterday will say that the 20 shares on cert. No. 13 was bought and transferred to me fully paid up which it reads. Kindly forward me new certificates *immediately* or return me the one you sent *at once*."

Defendant then returned said Garswick certificate to plaintiff and after some correspondence of a similar nature in reference to the Iverson certificates, also returned them to the plaintiff.

OSCAR M. TORRISON, for appellant.

ANDERSON & ANDERSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The certificates contain the provision that the stock is "transferable only on the books of the corporation by the holder thereof, in person or by attorney, upon surrender of this certificate properly endorsed." In the absence of any by-law, the mode of transfer provided in the certificate became a part of the contract between the corporation and the holder of the certificate, and we must look to the certificate to ascertain how the transfer is to be made. Garswick and Iverson each indorsed upon his certificates an assignment thereof to the plaintiff and an appointment of the plaintiff as his "attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises."

If the plaintiff had gone to the proper officer of the corporation and presented said certificates with the indorsements thereon and asked to make transfers thereof on the books of the corporation, it would have been the duty of such officer to produce such book and permit plaintiff to execute or register such transfers therein, and for a refusal to permit plaintiff to make such transfers he could maintain an action against the corporation. But to maintain such action he must show a strict compliance on the part of the holder of a certificate with the requirements of such certificate in respect to the transfer thereof.

In this case plaintiff did not go to the office of the defendant, or to any officer of the defendant, and ask to be permitted to execute on the books of the corporation a transfer of either the Garswick or the Iverson shares to himself. He did not appoint, under the power of substitution contained in the letters of attorney, another person to act as the attorney for Garswick or Iverson to make such transfer on said books.

All that he did was to send the Garswick certificate to the defendant by mail, accompanied by a letter to the corporation, in which he requested it to issue to him new certificates therefor, and to send the Iverson certificates to the defendant by mail, accompanied by a letter to its president requesting that the transfer of said certificates be registered in the books of the corporation, and that new certificates be issued to him.

It was the duty of the plaintiff under the certificates, the assignments and letters of attorney, either himself acting under such power of attorney, or through another appointed by him to act as such attorney in his place and stead, to go with such certificates and the assignments thereof to the proper officer of the corporation and demand permission to make the transfer on the books of the corporation, and it was not the duty of the defendant or of any officer of the defendant to make such transfer or issue new certificates upon the mere delivery by the plaintiff to the defendant of such indorsed certificates, with a request to make such transfer or issue such new certificates. *State ex rel. Townsend*, 2 Rich., S. C., 25; *Turnpike Co. v. Bulla*, 45 Ind. 1; *Mech. Bkg. Assn. v. Mariposa Co.*, 3 Rob. 395; *Hall v. Rose Hill, etc., Road Co.*, 70 Ill. 673.

If the provision of the certificate had been that it was "transferable only on the books of the corporation upon surrender of this certificate properly endorsed," then upon the surrender of such certificate properly indorsed it would be the duty of the officers of the company to make the transfer on the books. But in this case, by the express provision of the certificate, it was necessary that the holder of the certificate should in person or by attorney make the transfer on the books of the company. This neither Garswick nor Iverson offered to do, either in person or by attorney, and therefore the trial court properly directed a verdict for the defendant.

The judgment of the Superior Court will be affirmed.

Affirmed.

Henry C. Fish v. F. M. Marzluff.

Gen. No. 12,675.

1. **CONTRACT**—*what evidence tends to establish renewal of, from year to year.* Where an employe has worked under a contract which has been extended from year to year, payment made by way of salary, after the lapse of the extended period, is evidence which tends to establish the fact of renewal for a further year.

Action of assumpsit. Appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed and remanded. Opinion filed October 9, 1906.

JOHN F. CLARE, for appellant.

No appearance for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment upon a directed verdict for the defendant in an action of assumpsit for the breach of an alleged contract of employment by the defendants Marzluff and Rau of the plaintiff as traveling salesman for the term of one year from September 1, 1901.

The only question presented is, whether there is in the record evidence from which a jury might properly find that there was such a contract of employment as the plaintiff alleged as the basis of his right of recovery. The defendants were partners, but only appellee Marzluff was served with process.

The defendants first employed the plaintiff for the term of one year from September 1, 1899, at a salary of \$1,000 per year, expenses and certain commissions. This contract was by the agreement of the parties renewed or continued for the term of one year from September 1, 1900. In August, 1901, plaintiff re-

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quested an increase of salary for the coming year and the defendants wrote him as follows:

"JANESVILLE, WIS., August 22, 1901.

H. C. FISH, Chicago.

DEAR SIR:—Mr. Marzluff instructs me to write you that he and Mr. Rau have come to the conclusion that they will not pay you any increase in salary until you earn it by selling more goods.

Yours respt.,

F. M. MARZLUFF & Co.,

Tracy.

Kindly return your trunk and samples at once.

F. M. M. & Co."

The plaintiff on the receipt of this letter returned his trunk and samples. Plaintiff testified that, "the first week in September I received a twenty dollar check or draft, as they were usually sent in September, for my first week's salary in September."

September 10th defendant wrote to plaintiff as follows:

"JANESVILLE, WIS., 9/10, 1901.

H. C. FISH, Chicago, Ill.

DEAR SIR:—We are informed by good authority that you have made application and tried hard to connect yourself with other houses while in the employ of F. M. Marzluff & Co., without informing us to that effect. We are much surprised to think you would do a thing of that character without notifying us.

I am sure we would not have done that to you. We have the names of the houses to whom you have made application and I am indeed very sorry to be compelled to notify you in the face of this that we have been obliged to secure a man to fill your position.

Respecty.,

F. M. MARZLUFF & Co.,

A."

The direction to find the issues for the defendant was given at the close of the evidence for the plaintiff.

There is no evidence tending to prove a specifica

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agreement that the old contract should be renewed for another year from September 1, 1901. If, however, by the consent of the parties the plaintiff continued in the employ of the defendant after the expiration of the term, the law will imply a contract of employment for another year upon the terms of the old contract.

"It is the same in principle as a holding over by a tenant who is under a specified contract; if he holds over he will be considered as holding under the first contract if no change is shown." *Grover & Baker S. M. Co. v. Bulkley*, 48 Ill. 189-192; *Moline Plow Co. v. Booth*, 17 Ill. App. 574.

The decision turns upon the question whether the jury might, from the evidence, properly find that the plaintiff continued in the employment of defendant after September 1, 1901. It is not claimed that he rendered services after that time, but no inference for or against the plaintiff can be drawn from that fact or from the fact that upon the receipt of the letter of August 22nd he sent to the defendant his trunk and samples.

Plaintiff lived in Chicago, but did not sell goods in Illinois. He made two trips a year, one in the fall, the other in the spring. He returned from his spring trip in July, and if his employment was continued, he would have nothing to do until the defendants returned to him his trunk with new samples of goods to be sold on his fall trip. He had in other years gone out on his fall trip early in September.

The letter of August 22nd does not disclose any intention on the part of defendants not to continue the employment of plaintiff for another year, but only their refusal to pay him an increase of salary until he "earned it by selling more goods."

The testimony of the plaintiff that on September 5th defendants paid him twenty dollars for his salary for the first week of September, was not contradicted nor explained. Evidence of such payment and acceptance

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was evidence tending to show that the plaintiff continued in the employment of the defendants after September 1st, and we think the court erred in directing a verdict for the defendant.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Eugene J. Bronson v. American Type Founders Company.

Gen. No. 12,681.

1. **MORTGAGE**—*when extinguished by operation of law.* The decision in this case is controlled by that of the Supreme Court in *Merritt v. Niles*, 25 Ill. 282.

Action of assumpsit. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed. Opinion filed October 9, 1906.

Statement by the Court. November 11, 1901, appellee sold to appellant a printing press for \$700. For \$600 of the purchase money appellant gave his twenty-four notes for \$20 each and one for \$120 of that date, payable to the order of appellee, one of said notes for \$20 payable at the end of each successive month after date and said note for \$120 payable twenty-four months after date, and gave to appellant a chattel mortgage of said press to secure the payment of said notes, which was duly acknowledged and recorded.

August 10, 1903, appellant sold to one Jordan a half interest in said printing press. The notes above mentioned which fell due before the date of said sale were paid by appellant, and Jordan paid the note due August 11, 1903. Between August 10 and September 11, 1903, appellant sold his remaining half interest in said

printing press to the Moline Printing Company and Jordan sold to said company his half interest therein.

September 19, 1903, said printing company traded said press at \$425 to appellee to apply upon the purchase price of another press then sold by appellee to said printing company. Appellee was at said time the owner and holder of said mortgage and of the notes thereby secured which fell due after August, 1903.

This was an action at law by appellee, the mortgagee and payee, against appellant, the mortgagor and maker of the notes, to recover the amount of the said notes which fell due after August 11, 1903. The plaintiff recovered a judgment for \$180, the amount of said notes without interest, to reverse which the defendant prosecutes this appeal.

CHARLES G. HUTCHINSON, for appellant.

HOBART P. YOUNG, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an action at law and the question presented is, whether by the purchase of and transfer to the mortgagee of the printing press in question the mortgage was extinguished and the debt thereby secured paid by operation of law. A similar question was before our Supreme Court in *Merritt v. Niles*, 25 Ill. 282.

In that case *Merritt* gave a chattel mortgage upon a printing press to one *Horner* and a second mortgage thereon to *Niles*. The press before either mortgage became due was sold on an execution against the mortgagor to *Niles*, the holder of the second mortgage, who paid off the first mortgage and then sued *Merritt* at law upon the note the second mortgage was given to secure, and recovered a judgment for the amount of such note, which was reversed by the Supreme Court. In the opinion in that case it was said: "The mort-

gagor of a chattel, having the right of possession for a definite period, has an interest which may be sold by execution. The purchaser under the execution acquires thereby the right of possession and the absolute ownership, subject to the encumbrance.

Niles, in this case, was an encumbrancer prior to the execution, and so was Horner. Niles, by his purchase under the execution, acquired the right of immediate possession of the property, and the absolute ownership also, subject only to his own and Horner's encumbrance. By extinguishing these encumbrances, Niles became the absolute and undisputed owner, as a stranger would have been who had purchased at the sheriff's sale, and discharged the encumbrances. By paying off Horner's mortgage and taking the property into his possession as his own, his own encumbrance was thereby extinguished, for he could not subject the property in his own hands to its payment; he could not foreclose against himself, or sell the property to pay himself. He was paid by operation of law."

So far as the question now under consideration is concerned, we are unable to perceive any material difference between the facts of the two cases. The fact that Horner had a first mortgage in that case which Niles paid off after his purchase at execution sale, is immaterial. The Horner mortgage was not affected by the sale of the mortgaged property to Niles; nor was the Niles mortgage affected by the payment of the Horner mortgage by Niles.

Nor is the fact material that in that case the mortgagee purchased the property at execution sale upon a judgment against the mortgagor, and in this case by private contract with a remote vendee of the mortgagor. The Moline Printing Company had the same right to the press here involved that Merritt had to the press involved in that case—the right of ownership and possession, subject to the mortgage. The right and interest in the mortgaged property acquired by the

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plaintiff by the sale in this case was the same as that acquired by Niles in the mortgaged property by the sale to him. The question whether the Niles mortgage was extinguished and the note thereby secured paid, was directly involved in that case in an action at law upon such note by the mortgagee against the mortgagor and maker of the note, and it was held that by the purchase by Niles of the mortgaged property his mortgage was extinguished and the debt thereby secured, "paid by operation of law."

The decision upon that question is not affected by the fact that in the opinion another question is discussed and another ground suggested for the reversal of the judgment.

Upon the authority of that case we hold in this case that by the purchase by appellee of the mortgaged property, the mortgage of appellee thereon was extinguished and the debt thereby secured paid by operation of law.

The judgment of the Superior Court will be reversed, but the cause will not be remanded.

Reversed.

A. J. C. Ledgerwood v. A. Bushnell.

Gen. No. 12,684.

1. CONTRACT—*when special damages for breach of, in failing to make prompt delivery cannot be recovered.* Where the vendee at the time he accepts an order for the delivery of merchandise has no knowledge that such merchandise is to be used in the filling of a particular order, special damages arising from the vendee's inability to fill such an order on account of delay in delivery cannot be recovered.

2. DELIVERY—*what does not waive damages for delay in.* Acceptance of merchandise as tendered for delivery after the lapse of the time fixed by the contract for delivery, is not a waiver of the delay.

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Action of assumpsit. Appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed and remanded. Opinion filed October 9, 1906.

EDWIN F. ABBOTT, for appellant.

JOHN C. SCOVEL, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an action of assumpsit by Bushnell against Ledgerwood to recover the balance of the purchase price of certain lumber sold and delivered by plaintiff to defendant, in which the plaintiff recovered the full amount claimed by him to be due. So far as the plaintiff's claim is concerned, we see no reason to question the amount of the recovery.

The principal contention of appellant is, that the trial court erred in excluding certain evidence offered by the defendant in support of his claim to recoup damages alleged to have been sustained by him by reason of the failure of the plaintiff to ship the lumber within the respective times agreed upon in the contract of sale.

Plaintiff, the seller, was a lumber dealer at Kansas City, Missouri; defendant, the buyer, a building contractor in Chicago. The sale was made by the plaintiff through Caryl, a broker in Chicago, who had been requested by the plaintiff to take orders for lumber for him in Chicago, and furnished a list of defendant's prices for lumber. Caryl, on July 8, 1901, took from the defendant an order for a large quantity of lumber, a part thereof to be shipped by July 25th and the remainder by August 1st, and sent the same to plaintiff, and the latter, after some correspondence with Caryl in reference to defendant's financial standing, accepted said order and paid to Caryl a commission of thirty-five cents per thousand for making such sale.

The lumber was bought by defendant to be used by him in constructing a building in Chicago for the Chicago Ornamental Iron Works. The lumber was not shipped within the respective times stated in the contract, but was accepted by defendant when it reached Chicago.

The defendant upon the trial was asked by his counsel what he said, or what information he gave to Caryl at the time the order was given to him as to what the lumber was to be used for, to which question the plaintiff objected. The trial court sustained the objection, and ruled that what was said by defendant to Caryl, but not communicated to the plaintiff, was inadmissible. The court also refused to permit the defendant to show when the lumber was shipped or to show that he had a contract with said iron works and that by reason of defendant's failure to ship said lumber at the times agreed upon, defendant was delayed in the fulfillment of such contract and thereby suffered damage.

That it would have been competent for the defendant to prove that the plaintiff, when he entered into the contract with defendant to sell and deliver to him the lumber in question, was informed that the defendant had contracted with said iron works to erect a building and intended to use the lumber then purchased in erecting such building, is not disputed. If so informed, then the damages which defendant might sustain under his contract with the iron company in case the plaintiff failed to ship said lumber within the time agreed upon, might fairly be supposed to have entered into the contemplation of the parties when they made the contract and to be such damages as might be expected naturally and directly to follow and be the result of such breach of the contract, and therefore such damages might form the basis of a recovery or recoupment on the part of the defendant against the plaintiff. *Benton v. Fay*, 64 Ill. 417.

But if plaintiff was not so informed, then such damages could not be said to have entered into the contemplation of the parties or be such as could be expected to naturally follow or be the result of such breach of the contract, and therefore could not be the basis of a recovery or recoupment by defendant against plaintiff.

There is no pretense that the plaintiff, when he accepted the order, had any personal knowledge or information of the existence of the contract between the defendant and the iron works, or of the use the latter intended to make of the lumber ordered by him.

In *Williams v. Tatnall*, 29 Ill. 553-564, it was said: "Notice to agent or attorney, when received in the course of the business of the agency, or under such circumstances as to induce the satisfactory belief that it was received while transacting such business, is as effectual as notice to the principal personally."

Sterling Bridge Co. v. Baker, 75 Ill. 139, was an action by Baker against the bridge company for the hire of certain jack screws. The superintendent of the bridge company sent one Blair to Baker to procure the jack screws to be used in repairing a bridge. Baker told Blair that he should charge twenty-five cents a day for each jack screw, so long as it was away from his shop, and Blair testified that he did not communicate this fact to Spencer or any other agent of the defendant, and the court said (p. 140): "No previous arrangement had been made for these screws, and when Blair was sent, it was to get them. He was, as to this act, necessarily defendant's agent. His request for them was defendant's request; and what was said to him as to the terms upon which the defendant could have them, was said to an agent of the defendant about a matter affecting a special duty with which he was entrusted, and is, consequently, binding upon the defendant."

The question whether notice to Caryl at the time the order was given to him was notice to the plaintiff, his

principal, does not depend upon the question whether Caryl was the general or only the special agent of the plaintiff, nor upon the question whether such information was communicated by Caryl to the plaintiff, but depends upon the question whether the notice or information was given to Caryl in the course of the business of his agency, while engaged in the transaction of such business.

Blair was not the general agent of the bridge company; he was only a messenger sent by the superintendent to Baker to procure from him the jack screws, but what was said to him by Baker as to the terms upon which the bridge company could have the jack screws, was held binding upon the bridge company, although not communicated to any agent of the company, because said to him, "about a matter affecting a special duty with which he was intrusted by the bridge company."

By the question, to which objection was sustained, the defendant sought to show by his own testimony that at the time he gave the order to Caryl he told Caryl of his contract with the iron works and that he intended to use the lumber so ordered in the fulfillment of that contract. The question called for what was said, what information was given to Caryl, the agent of the plaintiff, while he was acting for the plaintiff, his principal, in the very transaction which was the subject-matter of the suit. Notice to Caryl in such a matter, under such circumstances would, we think, be notice to the plaintiff, and the trial court erred in sustaining plaintiff's objection to said question.

The contention of the appellee, that the defendant by accepting the lumber without objection when it was delivered after the time agreed upon, waived the right to recover or recoup in this action damages because of such delay, cannot be sustained.

"In the absence of other circumstances than the acceptance of property after the time specified for its

delivery there is no waiver of the right to recover damages because of the delay." Sutherland on Damages, sec. 665; Mechem on Sales, secs. 1381-1390.

For the error indicated the judgment of the Superior Court will be reversed and the cause remanded.

Reversed and remanded.

W. H. McDonald et al. v. George D. Holmes et al.

Gen. No. 12,588.

1. SAVINGS SOCIETY—*when trustees of, not liable for negligence.* Trustees of a savings society are not liable for negligence where the by-laws agreed to by the complaining party exempted them from liability except in cases of wilful misconduct.

Bill for accounting. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Reversed and remanded with directions. Opinion filed July 13, 1906. Rehearing denied July 27, 1906.

Statement by the Court. Early in 1899 the appellants, George B. Lathrop, A. R. Moulton, G. H. Armstrong and certain other persons, entered into an agreement in writing for the organization of an unincorporated society for savings, of which society any other person might become a member in the manner therein provided. Said agreement began as follows:

"That we, the subscribers hereto, in consideration of the benefits and advantages accruing to ourselves and to each other, do hereby associate ourselves together under the name and style of the Chicago Society for Savings for the purpose of conducting the business of a savings bank in the City of Chicago, in the County of Cook and State of Illinois, and that we hereby agree to be bound and governed by the following articles of agreement."

Article 1 of said agreement provided that any per-

son might become a member of said society by signing said articles and depositing one dollar or more, which membership should continue until such deposit was withdrawn.

Article 2, that the affairs of the society should be under the control of a board of trustees composed of eleven members, which board should have the power to choose their successors.

Article 3, that the first board of trustees should be composed of appellants and six others therein named.

Article 4 provided for the appointment of a president, treasurer and other officers of said society by said trustees.

Article 5, that the trustees, undertaking their duties without the expectation of emolument, and pledging themselves to an upright and conscientious discharge thereof, are not to be held responsible for any losses which may happen from whatsoever cause, except their wilful, corrupt misconduct, in which case those trustees only who are present and guilty of such misconduct shall be answerable for the same.

Article 6. It is expressly understood and agreed that no liability, other than for deposits, shall be incurred on the part of this society at any time in an amount exceeding fifty per cent. of its total merchandise assets.

Article 7. It is agreed that each member of this society shall be bound by, and shall possess no rights enforceable other than in conformance with the rules and regulations hereinafter set forth and hereto appended.

The provisions of the remaining articles and of the rules and regulations need not be here stated.

These articles of agreement were signed by eleven persons and the signers were, by article 3, made the first board of trustees. The trustees elected at their first meeting appellant McDonald president of the society, Lathrop treasurer and Armstrong secretary.

Moulton, Lathrop and Armstrong then and from that time until May, 1902, were engaged in banking at Chicago under the firm name of Moulton, Lathrop & Co.

Appellees Holmes and Quincey deposited money with the treasurer of the society and signed said articles of agreement, and Thomas S. Quincey made a similar deposit for his infant daughter Violet, and signed said articles for her.

In May, 1902, the following balances were due appellees from said society, viz.: to Holmes \$755, Quincey \$22.50, Jones \$40, and the society had a sum equal to the aggregate amount due said depositors on deposit in the bank of Moulton, Lathrop & Co., on May 24, 1902, when that firm was adjudged bankrupt.

The bill in this case was filed by appellees Holmes, Jones and Quincey, against appellants and the other members of said board of trustees. It sets out the facts above stated, avers that the money deposited by appellees with said Society for Savings was by said trustees carelessly and negligently left on deposit with said bank of Moulton, Lathrop & Co., and prays that said trustees may be compelled to account for the money received by them as such trustees, and that they may be decreed to pay complainants the amount of their said deposits.

After answer and replication the cause was referred to a master to take and report the proofs with his conclusions thereon. The master by his report found that the equities of the cause were with the defendants. The chancellor sustained the exceptions of complainants to the master's report, and entered a decree that the appellants pay to each of the complainants the amount due to each from said "Chicago Society for Savings," and from that decree this appeal is prosecuted.

RANDALL W. BURNS and AYERS, RINAKER & AYERS,
for appellants.

CHARLES H. BLATCHFORD, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

The society was created by written articles of agreement between its members. By those articles appellants with others were made trustees of the funds of the society. Each depositor on becoming so signed the agreement and became a party to it. Appellees thus became parties to the agreement, and their rights as well as the liability of the trustees to them must depend upon and be determined by the articles of agreement.

Articles 5 and 7 of that agreement are as follows:

"Article 5. The trustees, undertaking their duties without the expectation of emolument, and pledging themselves to an upright and conscientious discharge thereof, are not to be held responsible for any losses which may happen from whatsoever cause, except their wilful, corrupt misconduct, in which case those trustees only who are present and guilty of such misconduct shall be answerable for the same."

"Article 7. It is agreed that each member of this society shall be bound by, and shall possess no rights enforceable other than in conformance with the rules and regulations hereinafter set forth and hereto appended."

There is no evidence in the record even tending to show any wilful or corrupt misconduct on the part of any of the appellants, and by the express provision of article 5 the trustees were not to be held responsible for any losses which might happen from any cause other than their wilful, corrupt misconduct, and in that case only those trustees guilty of such misconduct should be answerable for the same.

The bill alleged that appellants failed to perform their duties as trustees; that the deposits of the society in the bank of Moulton, Lathrop & Co. at the time of their failure amounted to \$1,133.75, "which sum was carelessly and negligently left on deposit by said trustees in the bank of Moulton, Lathrop & Co."

If it be conceded that the trustees, under the articles of agreement, were liable for losses sustained by depositors through their negligence, the proofs do not support the allegation that the funds of the society on deposit in the bank of Moulton, Lathrop & Co. at the time of their failure were carelessly or negligently so left on deposit in said bank by the trustees.

It is true that the funds of the society were at the time of the failure of Moulton, Lathrop & Co. on deposit in the bank of that firm and that the trustees had adopted elaborate "Rules for the investment of funds," which provided that the funds of the society should be invested in certain specified classes of bonds, in mortgages on real estate, or in time loans secured by collateral. But the society had on deposit, at most, but \$1,133.75, and the proofs do not clearly show that it had any depositors other than appellees, and their deposits amounted in the aggregate to \$815.50.

A savings bank or society which three years after its organization has deposits amounting only to either \$815.70 or \$1,133.75, especially where \$755 of such deposits is due to one person, cannot be said to have on hand "funds for investment" in bonds, mortgages or time loans. With a sufficient amount of deposits and a sufficient number of depositors, such a society may properly invest a certain percentage of its deposits in bonds or time loans, but with only the amount of deposits and the number of depositors which this society had it was prudent and proper and not negligent to keep the entire amount of such deposits on deposit in a bank.

The financial reputation and standing of Moulton, Lathrop & Co. was good up to the time of their failure. Appellant Holmes was a depositor with the firm up to the time the Chicago Savings Society was organized. Some of the trustees were depositors with the firm up to the time of their failure. Moulton and Lathrop died before the bill was filed; Armstrong was a non-resident

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when the bill was filed. There is no evidence tending to show that any one of appellants or any trustee other than Moulton, Lathrop and Armstrong had any reason to suspect, up to the time of their failure that Moulton, Lathrop & Co. were not financially sound and responsible.

The proofs, in our opinion, do not establish any liability on the part of appellants to appellees for the amounts deposited by them in said society, and the decree of the Superior Court will be reversed and remanded with directions to enter a decree dismissing the bill for want of equity.

Reversed and remanded with directions.

Albert Wesley Gottschalk v. William H. Noyes et al.

Gen. No. 12,580.

1. **EXTENSION AGREEMENT**—*when not effected.* An extension agreement is not complete and therefore does not prevent foreclosure for default in payment of the mortgage debt where it was agreed that extension notes, etc., should be executed, but were not, upon request, so executed.

2. **MASTER**—*when reference to, without first ascertaining rights of parties, not improper.* It is not improper to refer a cause to a master to take proofs and report without first ascertaining the substantive rights of the parties in interest, where such rights are not abstruse and where the matter of the accounting would be the same irrespective of what such rights might ultimately be determined to be.

Foreclosure proceeding. Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Affirmed. Opinion filed July 13, 1906. Rehearing denied July 24, 1906.

Statement by the Court. Appellee, William H. Noyes, was the owner and holder of a note dated March

15, 1898, for \$2,000, payable five years after date, with interest at seven per cent. per annum, payable semi-annually, made by Alma Clark and Henry W. Clark, her husband. The note and interest were payable at the office of H. O. Stone & Company, Chicago. The interest was evidenced by ten coupon notes of \$60 each, due respectively as the several installments of interest fell due. The indebtedness represented by the notes was secured by a trust deed executed by Clark and wife to the Chicago Title & Trust Company as trustee, conveying the west half of lot 13 (except the elevated railroad right-of-way), block 1, in Johnson's subdivision, 36-40-13, commonly known as No. 560 Armitage avenue, Chicago.

On February 2, 1903, one Fix, who was then the owner of the property, conveyed it to George Gottschalk, who did not assume the indebtedness above described. George Gottschalk took the title, however, for the benefit of appellant, Albert W. Gottschalk, the real owner, to whom the title was afterwards conveyed. The deed to George Gottschalk was recorded February 3, 1903, but the deed from him to appellant was not recorded until after these foreclosure proceedings were commenced. The bill is an ordinary foreclosure bill.

Appellant answered the bill, but his answer is not abstracted further than to say that it denies that default was made in the unpaid portion of the principal note, and claims that the same had been extended; avers that he is the owner and in possession of the premises, and demands strict proof of the allegations of the bill.

The cause was referred to a master, who took the testimony and reported his conclusions on the law and the evidence. Objections and exceptions were filed to the report, and the court entered a decree of foreclosure.

ALBERT WESLEY GOTTSCHALK, appellant, *pro se*.

HART J. FITZGERALD, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The principal contention of appellant is that there was no default when the bill was filed on April 11, 1904, because there was a valid agreement of extension made February 6, 1903, between appellant and appellee, in consideration that appellant, who was not liable for the mortgage debt, should agree to pay, besides the interest accruing, \$100 on account of the principal on March 15th and September 15th of each year until \$500 on the principal had been paid.

A subsequent supplemental agreement was made, it is claimed, that a formal written extension of the mortgage should be made for three years from March 15, 1904, in consideration that appellant reduce the principal indebtedness to \$1,500 and sign the necessary extension papers, to be prepared by H. O. Stone & Co., on or before March 15, 1904, and pay Stone & Co. \$15 for preparing them.

At the time the bill was filed the principal note was overdue a year by its terms. Appellee then had a right to foreclose when he filed his bill, unless there was a valid agreement for a sufficient consideration for an extension of the mortgage and note.

We think it unnecessary to discuss the first extension agreement, for under the evidence that must be held to have been waived by the substitution of the second agreement providing for a formal extension of the payment of the loan for three years from March 15, 1904, and that coupon interest notes for that period were to be executed by appellant on or before that date and appellant should pay Stone & Co. \$15 for preparing the extension papers.

Appellant testified that he agreed with appellee upon the terms of an extension of the note and trust deed for three years, as follows: Appellant was to go to the

office of H. O. Stone & Co. on or before March 15, 1904, and pay \$100 in six months and \$100 in twelve months on the principal and \$54 on account of interest, and pay not to exceed \$15 for preparing the extension papers, and sign an extension agreement and interest notes for the three years; that he called at that office on March 15th, but the papers were not ready; that he never afterwards called to sign the papers, although he was notified by Stone & Co that they were ready for his signature.

The conclusion from this testimony is obvious, that it was a part of the oral understanding that appellant was to give certain extension notes and that he never executed them. This was a material part of the agreement without which the agreement was not completed. Appellee by his letter of March 21, 1904, requested appellant to call at the office of Stone & Co. and sign the papers for the extension, but appellant failed to comply with the request. It is clear, we think, that the proposed extension agreement was never completed and, therefore, there was no extension of the indebtedness represented by the note and mortgage. If there was no valid and complete agreement between the parties for an extension, then, beyond all question, the debt was due and unpaid and appellee had a right to file his bill to foreclose by reason of the maturity of the indebtedness.

Appellant assigns numerous errors in the proceedings of the court. It is claimed that the order of reference to the master did not empower the master to take testimony or to report in the case. We think, however, the order of reference clothed the master with power to take the evidence and report his conclusions.

We do not think the court erred in making a reference of the case to a master, without first hearing the evidence and declaring the rights of the parties. The rights of the parties were not involved in any obscurity or doubt. No questions of that character were pre-

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sented which would in any way change the accounting or finding of the amount due on the indebtedness. Appellant was not deprived of any right or equity by the reference.

Appellant was in no way concerned as to Alma and Henry W. Clark. He held their equities and could assert them. Whether they were properly served and brought into court or not could not in any way affect appellant's rights. If appellant wishes to redeem from the sale under the decree or pay the decree before sale, he can do so. The sheriff's return shows that they were properly served, and they are not raising any question as to the service upon them.

We do not find any error in the record of which appellant can complain as to the jurisdiction of unknown owners or the tender by appellant of \$1,814.19 to appellee in open court. Appellant was himself an unknown owner under his unrecorded deed until after the bill was filed. The record contains nothing tending to show any outstanding interest in unknown owners who are not brought into court, of which appellant can here complain.

The evidence and the admissions of the appellant in his answer and his testimony are amply sufficient to support the decree, and it must be affirmed.

Affirmed.

Joseph Michaud v. Jennie Phillippi.

Gen. No. 12,622.

1. JUDGMENT BY CONFESSION—*what not subject to review upon appeal from.* The orders of the court entered subsequent to the order of judgment are not subject to review.

Judgment by confession. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Affirmed. Opinion filed October 9, 1906.

FRANK L. BRADY, for appellant.

DALE & FRANCIS, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a judgment by confession entered in the Superior Court on January 17, 1905, upon a *narr* and *cognovit* for rent due on a written lease of the premises known as No. 94 Custom House place in the city of Chicago. The power of attorney to confess the judgment is contained in the lease, and is in the usual form. It authorized the waiving and releasing of all errors which may intervene in the proceedings for judgment. The *cognovit* following the power of attorney released all errors and waived an appeal from the judgment.

Appellant, on January 23, 1903, moved the court to set aside the judgment on two grounds: first, that the amount sued for in the declaration was \$225 and the judgment entered was for \$236.25 and in excess of the amount sued for; and second, that the premises were being used by appellant for immoral purposes, and were rented by appellee to appellant to be used for immoral purposes.

Evidence was introduced by appellant on the hearing of the motion tending to sustain both grounds. Counsel for appellee conceded on the hearing that appellee knew for what purpose the premises were used. Appellee remitted the sum of \$11.25 from the judgment. The court overruled the motion to vacate the judgment, and thereupon appellant prayed an appeal from the judgment and subsequently perfected the appeal by filing his appeal bond, which recites the appeal from the judgment. The orders of court entered subsequent to the order of judgment are not appealed from and are not before this court for review. *Millard v. Harris*, Ex., 119 Ill. 185.

This appeal brings the judgment record only before

us. The errors assigned call in question the amount of the original judgment, as being in excess of the *ad damnum*, and the action of the court in permitting appellee to enter a *remittitur*. That the court properly permitted the *remittitur* to be entered, cannot be doubted. *Campbell v. Goddard*, 117 Ill. 251. Appellant suffered no harm thereby. Where errors are released in the *cognovit* pursuant to powers given in the power of attorney, a judgment upon confession stands self-sufficient and free from error. *Elwell v. Fosdick*, 134 U. S. 500.

Finding no material error in the record, the judgment is affirmed.

Affirmed.

Chicago City Railway Company v. Patience Foster.

Gen. No. 12,694.

1. OBJECTION—*when not sufficiently specific*. The competency of the evidence of the character sought to be elicited is not raised where a question as follows: "What may cause such an injury as that to the spine?" is objected to on the ground that no proper foundation has been made and that it was incompetent and irrelevant.

2. EXPERT TESTIMONY—*what may be proved by*. It is competent in an action on the case for personal injuries to show by expert testimony what might cause a condition such as that shown by the evidence and claimed to have resulted from the accident in question.

3. INSTRUCTION—*as to mode of deliberation, approved*. An instruction upon this subject as follows, is approved, although its refusal is held not prejudicial error:

"The jury are instructed that if, under the instructions of the court they find from the evidence in this case that the plaintiff is not entitled to recover, then they will not have occasion to at all consider the character or extent of the plaintiff's alleged injuries, whether serious or slight."

4. INSTRUCTION—*what modification of, as to duty of carrier to passenger, not error*. The change of the word "high" to "highest" in the following instruction, held, not erroneous:

"The court instructs you that while it is the duty of a com-

mon carrier to exercise a high degree of care in the operation of its trains, yet it is not bound to exercise such care to guard passengers against their own acts of negligence."

5. SPECIAL INTERROGATORIES—*must relate to ultimate facts.* A special interrogatory which calls upon the jury to answer with respect to a mere evidentiary fact, is properly refused.

6. CONDUCT OF COUNSEL—*when Appellate Court will not reverse because of improper.* The Appellate Court will not reverse because of the improper conduct of counsel unless it is clear that prejudice has resulted.

7. VERDICT—*when will not be set aside as against the evidence.* The Appellate Court will not set aside a verdict as against the weight of the evidence where the conflict is in sharp conflict and facts and circumstances are in evidence which justify the verdict.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Affirmed. Opinion filed October 9, 1906.

Statement by the Court. This action was instituted by appellee to recover damages for personal injuries claimed to have been sustained by her as the result of being thrown from one of appellant's cable trains upon which she was a passenger, near the intersection of State and 26th streets, in the city of Chicago, on June 27, 1902. State street is a north and south street and 26th street intersects it at right angles, running east and west. Spring street is an east and west street which runs into State street from the west about 124 feet from curb to curb, and south of 26th street, its eastern terminus being the west line of State street.

It is claimed that appellee was a passenger upon a north-bound train consisting of a grip and one trailer car; that she was riding in the latter and that at some point between 26th street and Spring street the train was stopped in response to a signal given by a woman who accompanied her; that after it had stopped appellee's companion alighted safely, and that while appellee was in the act of following her the train was started and she was thrown to the ground.

No question upon the pleadings is urged in the briefs, and therefore it seems unnecessary to state them further than to say, that in the six counts of the declaration the corporate existence of appellant and its ownership and operation of the street railroad is alleged, and that it was propelling along the railroad tracks on State street a grip car and trailer in a northerly direction at and near 26th street; that plaintiff was a passenger for hire upon one of the cars, and that while she was endeavoring to alight from said car when the same had come to a stop to enable her to alight therefrom, and while plaintiff was in the exercise of all due care for her own safety, appellant so carelessly, wrongfully and negligently handled and managed the car that the same was started suddenly and without notice to her, by reason of which she was thrown upon the street and injured, etc.

Upon the trial the jury returned a verdict finding appellant guilty and assessing appellee's damages at the sum of \$9,000, and judgment was entered thereon.

WILLIAM J. HYNES, SAMUEL S. PAGE and WATSON J. FERRY, for appellant; MASON B. STARRING of counsel.

BRANDT & HOFFMANN, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

It is urged as a ground of reversal that in the examination of Dr. White, appellee's attending physician, who was called to see appellee immediately after the accident and continued to treat her down to the time of the trial, counsel for appellee was permitted to ask the witness the following question: "Q. What may cause such an injury as that to the spine?"

Dr. White had testified as to what her condition had been during his treatment of her, and that at the time of the trial she was suffering from traumatic neurosis, and that her condition proceeded from injury to the

bone, and then the above question was asked. The answer was: "Traumatism."

The same question in substance was asked of Dr. Steffenson, who examined appellee shortly before the trial for the purpose of qualifying himself to testify as to her physical condition. He had testified that she was suffering from injury to the spinal cord. The witness said that appellee's condition might be caused by direct injury or indirect injury to the spinal cord.

It is urged that this evidence was incompetent and that its admission was error; that the physicians were asked to speculate as to what might cause the condition they found present in appellee's person.

The objection made on the trial to this testimony was that no proper foundation had been laid and that it was incompetent and irrelevant. We do not think the objection was sufficient to raise the question now urged. *C. & E. I. R. R. Co. v. Holland*, 122 Ill. 468; *Village of Chalsworth v. Rowe*, 166 Ill. 114; *West Chicago St. R. R. Co. v. Buckley*, 200 Ill. 265. But, waiving the question of the sufficiency of the objection, we think the questions called for the opinion of the witnesses on a question of science upon which the opinions of experts are received. The questions do not call for the opinions of the witnesses as to what did cause the condition of appellee, which was an ultimate fact for the jury to find, but they are asked as to what might or may cause that condition, a very different question, calling for the opinions of the witnesses upon a matter which was peculiarly within their knowledge as scientific men. We think the questions were proper. *I. C. R. R. Co. v. Smith*, 208 Ill. 608, at pp. 616, 617 and 618; and *People v. Hare*, 57 Mich. 512; and *Lacas v. Detroit City Railway Co.*, 92 Mich. 412, and cases there cited.

Appellee was called as a witness in rebuttal and was allowed to testify that Dr. LeSage had been paid for his services rendered to her and to other matters which had been brought out in her cross-examination

in the case. These were not strictly rebuttal matters, but it was not reversible error to permit the testimony to be given.

Appellant requested the court to give the following instruction:

"21. If you believe from the evidence that the plaintiff and employes of defendant were both guilty of negligence proximately contributing to the alleged accident and injury, then you have no right to compare the negligence of the plaintiff with that of the others and find a verdict according to which side you think was guilty of the greater negligence, for in such case the law is that it makes no difference which was guilty of the greater negligence, the plaintiff can not recover, and your verdict should be not guilty."

The court refused to give the instruction as asked, but modified it by adding at the end thereof the following, and gave it as modified: "Provided you believe from the evidence that the plaintiff failed to exercise ordinary care for her own safety."

It is claimed on behalf of appellant that the addition made by the court robbed the instruction of all its force and virtue and rendered it nugatory. With this contention we do not agree. The only element in the instruction of value to appellant was the negligence of plaintiff contributing to the injury, in connection with the negligence of the employes of appellant. The addition by the court simply repeated this proposition. This could do appellant no harm or afford it any just ground of complaint. The addition by the court is but a repetition, in substance, of the thirteenth and twentieth instructions asked by appellant. These instructions the jury should, and presumably did, read in connection with the twenty-first instruction now under consideration. The modification by the court, therefore, could not affect appellant injuriously, and it was not reversible error.

The court was asked by appellant to instruct the jury as follows:

"23. The jury are instructed that if, under the instructions of the court, they find from the evidence in this case that the plaintiff is not entitled to recover, then they will not have occasion to at all consider the character or extent of the plaintiff's alleged injuries, whether serious or slight."

The court refused the instruction. We think the instruction was proper and should have been given. It is difficult, however, to understand how the refusal to give the instruction prejudiced appellant in any way. The jury found under the instructions of the court that the plaintiff was entitled to recover and assessed the plaintiff's damages. It is fair to presume that the jurors selected by the parties possessed sufficient intelligence to know, without being informed by the court, that if they found for appellant they could not give the plaintiff any damages. Moreover, the jury did find specifically that the plaintiff by the exercise of ordinary care could not have avoided the injury, and hence the contingency on which the instruction was hypothesized did not arise.

Appellant requested the court to submit to the jury the following instruction:

"22. The court instructs you that while it is the duty of a common carrier to exercise a high degree of care in the operation of its trains, yet it is not bound to exercise such care to guard passengers against their own acts of negligence."

The court struck out the word "high" in the second line of the instruction and inserted in place thereof the word "highest," and gave the instruction to the jury so modified.

It is urged that the modification was erroneous, because it incorrectly defined the duty of a common carrier. In support of this contention counsel cite *North Chicago St. R. R. Co. v. Polkey*, 203 Ill. 225, and *Tri-City Ry. Co. v. Gould*, 217 Ill. 317, wherein it is held that a railroad company as a carrier of passengers is held by the law to the use of the highest degree

of care consistent with the practical operation of its railroad, and urge that a common carrier is not bound to exercise the highest degree of care towards its passengers, without limitation. This, we think, is not to the point. The point of the instruction was not the degree of care which the carrier owes to the passenger, but, whatever that degree of care was, that the carrier was not bound to exercise it to guard passengers against their own acts of negligence. The instruction was just as beneficial to appellant in the form in which it was given as in the form in which it was asked.

Complaint is made that the court refused to submit to the jury the following special interrogatory:

“Has the plaintiff proved by a preponderance of all the evidence in the case that the train in question was standing still at the time she attempted to alight from the same?”

This did not call upon the jury to find an ultimate or material fact in the case alleged in the declaration, as whether the train in question was standing or moving at the time appellee attempted to alight from it. The question asks for the opinion of the jury as to whether or not the plaintiff had proved a fact by a preponderance of the evidence in the case. The statute does not authorize the court to ask the jury to state in a special verdict in regard to the preponderance of the evidence upon any material issue in the case. Nor does the statute authorize the court to ask the jury or require them to find whether the plaintiff's evidence alone and by itself constitutes the “preponderance of all the evidence in the case” upon any material question in the case. It may be and often is the fact, that some part of the defendant's evidence upon the same question supports or gives weight and force to the plaintiff's evidence, and thus becomes a part of the preponderating proofs. Hence such a query would be useless and without reason. In our opinion the interrogatory was properly refused.

Much space in the printed arguments of appellant and appellee is given to discussions of the misconduct of counsel on both sides of the case during the trial. It is urged on behalf of appellant that by the misconduct of counsel for appellee it was deprived of a fair trial, and of a fair and impartial presentation of the case to the jury. On the other hand it is claimed by counsel for appellee that counsel for appellant was guilty of gross misconduct which provoked the statements, comments and exclamations of counsel for appellee complained of. That the hearing of the case was not dignified and orderly, is clearly apparent from the record. Many things occurred during the trial which must be condemned as improper. Upon a review of the case as shown by the record, we are of the opinion that we ought not to set the judgment aside because of the improper conduct of counsel. We do not approve it, and the trial judge condemned it; but the record comes to this court bearing the official sanction of the trial judge. Every reasonable presumption must be indulged in that the trial judge has performed his duty and has properly exercised the discretion vested in him. He was present at the trial and heard the remarks of counsel on both sides and is, therefore, much better able to judge whether anything was said, or whether any incident transpired during the trial which justified the remarks made by counsel. Courts of review are loth to interfere in such matters, unless it becomes necessary to prevent a failure of justice. We cannot see that such is the case here.

Upon consideration of all the evidence in the case we do not find that the verdict and judgment is clearly against the weight of the evidence. We cannot say from the evidence on both sides, with all the inferences that may be justifiably drawn from it, that all reasonable minds would reach a conclusion opposed to the finding of the jury. The evidence presents a sharp conflict upon material issues, with facts and circum-

stances which by a fair and reasonable intendment warrant the inferences of the jury. Under such circumstances courts will reluctantly, if ever, disturb their verdict, although it may appear to be against the strength and weight of the evidence. Where, in the conflict of the evidence the verdict must depend upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility. Where, as in this case, there is an irreconcilable conflict in the testimony, and the evidence of the successful party when considered by itself is clearly sufficient to sustain the verdict, we ought not to reverse the judgment of the trial court. *Calvert v. Carpenter*, 96 Ill. 67; *Shevalier v. Seager*, 121 Ill. 569.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1906.

Abner L. Barlow v. The Farmers' Mutual Fire Insurance Company.

Gen. No. 4,709.

1. **INSURANCE**—*what essential to binding contract of.* In order to make a binding oral contract for insurance, one party must propose to be insured and the other party must agree to insure, and the subject, the period, the amount and the rate must be ascertained or understood and the premiums must be paid if required. There must be a certain and definite contract, express or implied, covering all these essential elements.

Action of assumpsit. Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

H. A. BROOKS and C. C. BROOKS, for appellant.

E. E. WINGERT and A. C. BARDWELL, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The declaration in this suit brought by Barlow against a fire insurance company, charged that on February 11, 1905, defendant made a contract of insurance with plaintiff, and thereby, in consideration of

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\$9 to be afterwards paid by plaintiff to defendant, did insure plaintiff against loss by fire to the amount of \$1,500, on the terms, conditions and provisions of the charter and by-laws of defendant, as follows: On his dwelling-house, situate on certain described lands in Lee county, \$900; on his barn on said premises, \$200; on the other outbuildings on said premises, \$400; that on February 16, 1905, said dwelling-house was destroyed by fire, and plaintiff thereby sustained loss on said property to the amount of \$1,500 which defendant, though requested, has refused to pay. Defendant pleaded the general issue. There was a trial, a verdict for defendant and a judgment thereon, from which plaintiff appeals.

Plaintiff was a member of defendant company and had insurance in it upon other property owned by him. There was no written contract of insurance covering the property described in the declaration, but plaintiff sought to prove an oral contract. On May 24, 1899, Oliver P. Courtright owned the farm described in the declaration, and on that date defendant issued to him a policy of insurance on the buildings on said farm, of which \$900 was on this dwelling-house. By a deed dated and acknowledged December 22, 1900, and recorded February 6, 1901, Courtright conveyed the property to plaintiff. Soon after, plaintiff learned from defendant's agent that there were two back assessments unpaid upon that policy, and he therefore declined to take it, and on March 21, 1901, defendant canceled that policy because the property had been sold and the insurance had not been transferred. Thereafter, and prior to August 20, 1904, plaintiff and Seavey, an agent of defendant, had conversations upon the subject of plaintiff's insuring the buildings on the Courtright farm with defendant. On August 20, 1904, Seavey wrote plaintiff as follows: "Your business has been put off, or rather, I have been kept from attending to it so long that I do not feel right about it.

Now if you will set a day next week when you can attend to it, I will come to your place and look over the buildings and we will fix the matter up. Please send word on the enclosed card." A postal card addressed to Seavey was enclosed with this letter. Plaintiff did not fix a time or reply to the letter, and nothing further was done about the insurance at that time.

On the morning of Saturday, February 11, 1905, a building owned by plaintiff situated on another farm and insured with defendant, was destroyed by fire. That evening plaintiff had a conversation with Seavey over the telephone, and if defendant ever entered into an oral contract to insure the buildings on the Court-right farm for plaintiff, such contract was made in that conversation. Plaintiff testified that he asked Seavey over the telephone if he knew plaintiff had had a fire, and Seavey replied that Coe, president of defendant, had told him; that plaintiff then told Seavey he was ready for that insurance on the Courtright farm and wanted all his insurance increased as they had talked previously, and was in a hurry to have it done; that Seavey said he would come over the first of the week and "fix the matter up," or "fix it up;" that plaintiff said he wished Seavey would come over on Monday; that Seavey said it was snowing at that time, and if the roads were blocked on Monday he would fix the matter up the first day following; that when plaintiff mentioned raising the insurance Seavey said that the buildings were such on the Courtright property that he would not want to increase the insurance Court-right had on that property, and that plaintiff replied to that "All right." In order to make a binding oral contract for insurance, one party must propose to be insured and the other party must agree to insure, and the subject, the period, the amount and the rate must be ascertained or understood, and the premiums must be paid if required. There must be a

definite and certain contract, express or implied, covering all these essential elements. *Ins. Co. of N. America v. Bird*, 175 Ill. 42; *Milwaukee Ins. Co. v. Graham*, 181 Ill. 158; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77. Some of these elements can be supplied by implication in the present case. The insurance plaintiff sought was understood by himself and Seavey to be in the defendant company; and the by-laws of defendant fixed the rate of premium on ordinary farm risks, the charge for the examination and the policy, and made the term perpetual. Plaintiff was already a member, and it might well be presumed that in the conversation both parties spoke with knowledge of these provisions. If Seavey had replied, "We will insure the buildings on the Courtright farm at the same sums as in Courtright's policy," a promise by plaintiff to pay the premium might well have been implied, and the contract might then have been complete. But Seavey did not say defendant would insure these buildings. He only said he would come over Monday or Tuesday and "fix the matter up," or "fix it up." These words cannot be stretched into a present agreement to insure. They meant that Seavey would come over the next week and make a contract of insurance with plaintiff. Seavey cannot be presumed to have meant any more by those words than he meant when he wrote plaintiff during the previous August, "If you will set a day next week when I can attend to it, I will come to your place and look over the buildings and we will fix the matter up," and plaintiff does not claim that that letter constituted an agreement to insure. While Seavey said over the telephone that owing to the condition of the buildings he would not want to increase the insurance Courtright had on the property, he did not say he would place as much insurance on them as Courtright had, and it is obvious that his purpose in agreeing to come over on Monday or Tuesday was to see the buildings and their condition before writing any insurance upon them.

On Thursday, February 16, 1905, the day the dwelling-house involved in this case was burned, but earlier in that day, Seavey wrote and mailed to plaintiff a letter in which he explained that the roads were blocked Monday; that he had caught a severe cold and would not be able to leave home that week; that he had telephoned Coe, the president, to see if he could attend to it, but that Coe was in the same fix; and Seavey added: "The buildings will have to be examined by whoever writes them up." Coe testified for defendant, that Seavey telephoned him after the first fire that plaintiff wanted some insurance, and he replied that he had a heavy cold and could not go out; that a couple of days later he met plaintiff and plaintiff told him that having had a fire he was anxious to have insurance on these other buildings, and that he told plaintiff he had a heavy cold and could not go out, and if plaintiff was anxious about it he had better go to some old line company, and that he had better not wait on Seavey as he was out of health. Plaintiff does not deny this conversation, but says it was after the second fire, and related to the other buildings. Coe also testified that when defendant settled with plaintiff for the first fire, plaintiff asked what they were going to do about the second fire, and he told plaintiff that as he understood it they had no insurance on that property, and plaintiff replied that he had applied for insurance and none of them came out to write up the insurance or look up the matter, and that he felt that he was entitled to damages, and Coe replied that they had no right to pay out the people's money for property they did not have insured, and that ended the conversation. Plaintiff did not deny this conversation, but practically admitted it, and said that when they said they had no insurance on this property, he told them that he had called for the insurance and it was not attended to. We think it clear from the testimony introduced by plaintiff and from the testimony introduced by defendant and not contradicted, that defendant's agent did not agree to insure this

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property, and that neither so understood it at the time, or even when the loss on the first fire was settled after the second fire had occurred. Therefore plaintiff could not recover, upon his own showing. Of Seavey's version of his conversation with plaintiff over the telephone, it is sufficient to say that, if it was true, there was no contract to insure.

Plaintiff complains of the refusal of certain instructions requested by him. All that was correct in these instructions was embodied in other instructions given at plaintiff's request. Several of the refused instructions either omit a necessary element of a valid oral insurance, or incorrectly state what would be sufficient to create such a contract, and the seventh would have incorrectly told the jury that the statement by the agent that "he would fix the matter up," was an agreement to insure. But if there was any error in the rulings of the court upon the instructions, yet that would not be ground for reversal, because the plaintiff's proof does not show that a contract of insurance was entered into. We approve of the rulings of the court upon the admission of testimony of which complaint is made.

The judgment is, therefore, affirmed.

Affirmed.

Modern Woodmen of America v. Lizzie A. Graber.

Gen. No. 4,715.

1. **MOTION FOR NEW TRIAL—when need not be written.** A motion for a new trial need not be in writing where no rule was asked or entered requiring that points in writing be filed.

2. **MOTION FOR NEW TRIAL—what does not waive.** A motion for a new trial is not waived by a statement made in court that the motion is merely formal, where the overruling of the motion was followed by an exception and where the motion was preceded by another motion upon which the same argument was made which

would necessarily have been made upon the argument of the motion for a new trial.

3. *DEATH—what essential to indulgence of presumption of, arising from absence.* In order to establish a presumption that a person is dead from his absence for seven years, there must be diligent inquiry at his last place of residence and among his relatives and among others who probably would have heard from him if living. But in this connection hearsay or evidence of repute is competent.

4. *PROOFS OF DEATH—admission of, proper.* It is proper, in an action upon an insurance policy to receive upon behalf of the plaintiff proofs of death submitted to the insurance company, as these proofs are an essential element of the plaintiff's case unless waived by the defendant.

Action of assumpsit. Appeal from the Circuit Court of Woodford county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed October 16, 1906.

TRUMAN PLANTZ and JOHN F. BOSWORTH, for appellant.

JOHN R. TWEDDALE and THOMAS KENNEDY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Appellee began this suit on July 6, 1905, upon a beneficiary certificate issued by appellant on March 23, 1893, whereby it agreed to pay her \$2,000 upon the death of her husband, George Graber. The declaration averred that on January 20, 1898, Graber suddenly and without explanation left and disappeared from his home near Washburn, Illinois, and has been unaccountably absent and has never returned or been heard of since; that diligent and continuous search was made for him from the day of his disappearance up to the time of the commencement of the suit, but that no intelligence of him could be obtained, and that plaintiff has been wholly unable to find him; that Graber was absent without explanation

from his usual place of abode for more than seven continuous years immediately prior to the beginning of this suit, and that he is dead; that on January 21, 1905, said "unheard of absence" had continued seven years, and at the end of seven years he was presumed by law to be dead. The declaration also averred payment of all dues and assessments, and that plaintiff had furnished proofs of death and had fully complied with the terms of the contract and with the rules of the fraternity. Issue was joined upon a plea of the general issue, and upon the second, third and sixth special pleas. Appellee recovered a verdict and a judgment for \$2,000 from which the society appeals.

Appellee argues that the appeal cannot be considered, because appellant did not file a written motion for a new trial, setting out the reasons therefor. No objection was made to the motion because it was not in writing, and no rule was asked or entered requiring that points in writing be filed. They were, therefore, waived. *Union Traction Co. v. City of Chicago*, 209 Ill. 444; *Kniel v. Spring Valley Coal Co.*, 96 Ill. App. 411. Appellee argues that the motion for a new trial was waived, because when the court asked appellant's attorney if he wished to argue it, he replied, "No, the motion is purely formal." Appellant moved to instruct the jury to find for the defendant at the close of plaintiff's evidence, and again at the close of all the evidence. These motions raised the point mainly relied upon here, and the court ruled thereon adversely to appellant. The record shows that the motion for a new trial was made and denied the same day that the verdict was returned. It is fair to assume that appellant's attorney considered it useless to argue its contention further in that court. He was not asked to make an argument or to state the grounds of his motion. If he had meant to waive the motion, he would not have immediately excepted to its refusal. We con-

clude he did not mean, and was not understood to mean, that he waived the motion for a new trial. *Landt v. McCullough*, 206 Ill. 214.

There was no direct proof of the death of Graber. The main question here argued is whether there was sufficient proof to authorize the presumption that he died before the proofs of death were presented to appellant. In order to establish the presumption that a person is dead from his absence for seven years, there must be diligent inquiry at his last place of residence, and among his relatives, and among any others who probably would have heard from him if living. *Hitz v. Allgren*, 170 Ill. 60; *Policemen's Benevolent Association v. Ryce*, 213 Ill. 9; *in re Stockbridge*, 145 Mass. 517. Graber was forty-eight years old when he left home. He had a wife and three children with whom he lived on a rented farm. These children were fifteen, sixteen and eighteen years old at the time of the trial in March, 1906, and therefore must have been about seven, eight and ten years old when their father left. He was always very fond of them. Plaintiff was absent from home when her husband left. The children were at home when she returned at night. He may have told them where he was going. He may since have written to them. They did not testify. Appellee's excuse for not calling them seems to be that Graber would be much more likely to write to his wife than to these children. The record does not leave it certain that that is so. While appellee testified that there was no trouble between herself and her husband, and neighbors testified that they did not know of any, yet there are indications in the proof that there was such trouble. When asked how her husband treated her, appellee answered: "He treated me fairly well," which implied some dissatisfaction on her part. That morning Graber took the children to school, about a mile from home. Appellee was to go to town, and waited till eleven o'clock A. M. for him to return,

and he did not come. She then drove to Washburn, four miles distant, and on the way met her husband driving towards home. Graber smiled at appellee, but neither of them stopped or spoke. This tended to show some constraint or disagreement between them. When appellee returned at six o'clock in the evening, her husband had left, and she has not seen him since. She found the lock off the door of their home, some of her husband's clothing cut and torn and some eggs broken. All these circumstances tend to indicate that there had been some trouble or disagreement between appellee and her husband. If so, he might write to his children rather than to his wife. We are of opinion they should have been called as witnesses, in making plaintiff's case, and that for failure to call them the presumption of death was not established.

Graber was born in Alsace-Lorraine, now a part of Germany, and lived there till he was a man grown or later. He had a brother who lived there when Graber disappeared, and who still lives there. Appellee undertook to show that Graber had not been heard from by this brother or at his old family home during the seven years after his disappearance from his home in Illinois. For this purpose she called a nephew living in Illinois, a son of that brother in Alsace-Lorraine, and sought to prove inquiries by him in his correspondence with his father and what he learned in reply. We are of opinion that heresay, tradition and common repute in the family is competent proof upon this subject. *Cuddy v. Brown*, 78 Ill. 415; *Metheny v. Bohn*, 160 Ill. 263. But the evidence of this nephew was too incomplete to establish the fact for which he was called. He did not state what answers he received to his inquiries, but gave instead his own conclusions therefrom. He did not distinctly show that he had received any information on the subject from his father and other relatives there after the answer to his first letter written not long after Graber disappeared. He

did not distinctly show that he had information from the family there covering the whole seven years.

The proofs of death were properly admitted, they being an essential part of appellee's case, unless waived. *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179. The letters written by officers of the society to appellee were competent for the purpose to which the court limited them. But for the want of sufficient proof to raise the presumption of death, the judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Louis A. Burgener et al. v. Layton Lippold.

Gen. No. 4,712.

1. **ADMISSIONS**—*how proof of, may be made.* Admissions contained in pleadings filed in a cause pending in court are competent proof in another cause, if relevant.

2. **POSSESSION**—*presumption of continuance of.* The fact of possession being established, the presumption of law follows that possession continues until the contrary is shown by the evidence.

3. **REOPENING CASE**—*when not improper.* Where a case has been tried by the court without a jury, it is proper for the court to permit a party to reopen his case and introduce further evidence.

4. **PROPOSITIONS OF LAW**—*effect of failure to present.* Where propositions of law are not submitted, no questions of law are presented for review except such as are raised by the rulings of the court with respect to the admission and exclusion of evidence.

Action commenced before justice of the peace. Appeal from the City Court of Aurora; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

A. H. SWITZER and FRANK G. PLAIN, for appellants.

SEARS & SMITH and JOHN C. MURPHY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is an action of forcible detainer brought before

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a justice by Lippold against Burgener and wife to recover possession of lot 8 in block 8 in Bidwell's addition to Aurora. Plaintiff recovered before the justice and again in the City Court on appeal. Defendants prosecute this further appeal, and argue that the proof does not show plaintiff was entitled to the possession when the suit was brought, or that defendants were then in possession, or that they refused to surrender possession upon demand by plaintiff; and also that the court erred in sustaining objections to certain questions put by defendants.

Plaintiff introduced a deed of said premises from Michael Kehl to himself, dated and acknowledged March 9, and recorded March 10, 1900, and a written demand by him for possession of said premises, and proved service of the same upon defendants by copy on January 20, 1902, two days before this suit was begun. Plaintiff also put in evidence a bill in equity filed in the City Court of Aurora by Burgener and his wife against said Lippold and said Kehl, after this suit had reached the City Court on appeal. That bill set up that on April 1, 1897, Kehl owned and possessed said lot; that he then entered into an agreement with said complainants, Burgener and wife, to execute a deed of said premises to them which should take effect at his death, for certain considerations in said bill stated, including the support of said Kehl and the rebuilding and repairing of the house on said premises; that said complainants took possession of said premises as soon as they had made them tenantable, and since that date used and occupied them; that they had kept their contract; that Kehl refused longer to board with complainants, and, in order to deprive them of their interest in the premises, conveyed them to Lippold by the deed above mentioned; that Lippold paid no consideration and took said deed with full knowledge of the rights of complainants, and solely for the purpose of defrauding them. The

bill also set up the bringing of this suit in forcible detainer by Lippold against complainants, his recovery of a judgment against them for possession, their appeal therefrom to said City Court; that Lippold and Kehl were continually "hindering and disturbing your orators in the peaceable possession of said property." The bill prayed, among other things, that the deed from Kehl to Lippold be set aside, that Kehl be required to perform his contract with complainants, and that Lippold be enjoined from prosecuting this forcible detainer suit and "from disturbing the possession of your orators in said premises." Said bill was under the oath of Burgener. A temporary injunction was granted. Plaintiff also introduced an answer by Kehl and Lippold to said bill. It admitted that Kehl owned and possessed the premises at the time stated in the bill and had conveyed them to Lippold, but denied most of the other material allegations of the bill. Plaintiff also introduced the decree entered upon the final hearing of said cause, by which decree the injunction was dissolved and the bill was dismissed for want of equity.

This bill, filed by the defendants in the present suit and under the oath of one of them, and relating to the prosecution of this very suit, was competent evidence against defendants, and was *prima facie* proof of the admissions therein made. *Robbins v. Butler*, 24 Ill. 387, 427; *Daub v. Engelbach*, 109 Ill. 267; *Gardner v. Meeker*, 169 Ill. 40. It is argued that it cannot have the effect to prove that the complainants therein, defendants here, were in possession of the premises at the commencement of this suit, for the reason that the answer of Kehl and Lippold denied such possession, and the decree found "that none of the material allegations of complainants' bill of complaint that are denied by the answer are sustained." We do not concede that the decree could deprive the bill of its quality as evidence of admissions by the complainants therein,

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but we do not construe the answer to deny that complainants were in possession of the premises, but it denies that they took possession and used and improved the premises "as in said bill alleged," that is, under the contract and claim of right set up in the bill. This bill, therefore, shows that Burgener and his wife took possession long before Lippold's demand for possession, and that they retained that possession up to the date when the bill was filed and the further prosecution of this suit was enjoined. That possession is presumed to have continued. *Ragor v. McKay*, 44 Ill. App. 79. The bill, therefore, shows that they did not deliver up possession when demanded by Lippold, and that they had possession when this suit was brought.

The case made is that Kehl owned and possessed the premises; that he let Burgener and wife into possession with him; that he afterwards conveyed to Lippold, and moved out himself; that Lippold demanded possession of Burgener and wife, and they did not yield possession; that Lippold brought this suit, and they then filed a bill to enjoin it, setting up an alleged contract with Kehl under which they entered and which they had performed, and averring that they were without remedy save in a court of equity; and that upon a hearing there was a decree finding against their alleged rights. They were bound to set up in that bill and litigate in that case all their rights and all their defenses against this suit. That decree was proof that they were in possession without right. The facts, therefore, established a right in plaintiff to recover. The questions put by defendants to Kehl and to which the court sustained objections, were intended to reopen and relitigate questions settled by the decree. The case was tried without a jury, and the court did not err in permitting plaintiff to offer further proof in chief, after he had once rested. No propositions of law were presented, and no questions are, therefore, preserved for review by the record, except the question whether the court

erred in rulings upon the admission of testimony and whether the proof warranted the judgment. We are of opinion plaintiff was entitled to recover under the proofs and that there was no reversible error in the rulings upon the evidence. The judgment is, therefore, affirmed.

Affirmed.

Chicago & Northwestern Railway Company v. Lillian Thomson, Administratrix.

Gen. No. 4,693.

1. CONTRIBUTORY NEGLIGENCE—*when person guilty of.* A person who receives an injury is guilty of contributory negligence where he does that thing which no reasonable mind would do and is thereby made the subject of the injury complained of.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Whiteside county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the April term, 1906. Reversed, with finding of fact. Opinion filed October 16, 1906.

D. J. CARNES and S. A. LYNDE, for appellant; LLOYD W. BOWERS, of counsel.

BLODGETT & RIORDON, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Robert C. Thomson was a section man on the Chicago & Northwestern Railway and was killed while on duty September 8, 1904, by a fast mail train running upon said railway. The administratrix of his estate brought this suit to recover for the benefit of his next of kin, damages on account of his death. The first count of the declaration charged that said train was negligently run at a great rate of speed without due care for the safety of employes of defendant, and

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that by reason of such careless operation defendant struck and killed deceased. The second count charged that no bell was rung or whistle sounded, as required by statute. Additional counts were afterwards filed and issues were joined on counts five, seven and eight. The fifth count charged negligence in not stopping said train when the servants of defendant in charge of it could by the exercise of reasonable care have seen the person on the railroad track. The seventh count charged that the track was covered with a dense fog and that defendant negligently ran said train without any headlight burning on its locomotive, contrary to a rule of defendant requiring headlights to be lighted when running in a fog. The eighth count charged that the defendant negligently ran its train without ringing a bell and sounding a whistle, in violation of a rule of the company requiring the engine bell to be rung on approaching a whistling post at every public road crossing at grade and to be kept ringing until the crossing is passed and requiring the engine whistle to be sounded at all whistling posts. Defendant pleaded the general issue, and there was a jury trial and a verdict and a judgment for plaintiff for \$4,500, from which defendant prosecutes this appeal.

Thomson was a section hand on a section of the railway which included its double track between the villages of Galt and Rock Island Junction and some distance east of Galt and west of the junction. The foreman and all the section men except Thomson lived at Galt, and the section gang started from Galt each morning. Thomson lived at the junction, about two and one-half miles west of Galt, and by an arrangement with his foreman his time began when he started from the junction at 7 A. M., which was the time the rest of the gang went to work. It was his duty to walk east towards Galt till he met or overtook the rest of the section gang, and while so doing his work was to watch the tracks and see if anything was out of order.

The railroad runs substantially east and west at this locality. On September 8, 1904, Thomson left the junction at 7 A. M., and proceeded east along the track. Just west of Galt a north and south highway crosses the railway. On that morning the section gang went to work 300 or 400 feet west of that highway crossing, cutting weeds and grass on the right-of-way. Between Sterling on the east and the junction, these tracks were also used by trains of the Chicago, Burlington & Quincy Railway Company, which will hereinafter be called the Burlington. About 7:35 A. M., a Burlington freight train passed west through Galt on the south track at a speed of twenty or twenty-five miles per hour. There was a very heavy fog and the smoke of the Burlington engine settled down by the side of that train over the north track. There was a whistling post 1317.6 feet west of the highway. Some distance east of the whistling post the engineer of the freight train saw Thomson walking east on the north track, which was the track used by eastbound trains. It is surmised that when Thomson left the junction, he walked east on the south track used by westbound trains, because that was the safer and usual course, but we do not find any proof that anyone saw him or knew on what track he walked until he was seen by the Burlington engineer. If he had been walking on the south track, he had discovered the approaching Burlington train and stepped over on the north track before the Burlington engineer saw him. The Burlington engineer knew and recognized Thomson. Almost immediately afterwards, and near the whistling post, the Burlington engineer met a Northwestern fast mail train going east on the north track. It was three hours and twelve minutes late, was running at its usual speed of sixty miles per hour and was not making up any time. That train struck and killed Thomson, probably about opposite the middle of the freight train. His dinner pail was found 930.2 feet west of the highway and he was no doubt

struck at that place. His body was found nearly 100 feet further east. The proof showed that section men are required to look out for all trains running on their section, including regular trains on time and behind time, and extras and specials. No notice is given them that regular trains are behind time or that extras or specials are coming from either direction, nor do the foremen or the men ask for such information when at the station. The section men, under the regulations prevailing on this road at that time, were required to look out for themselves and for trains in all directions at all times. This proof is uncontradicted, and it is manifest that the commercial needs of the country would not be answered by a railroad on which trains were required to look out for all men working on and about the track and to run slowly enough and have trains under such control as to avoid injuring them if they get on the track in front of an advancing train.

The only possible ground on which it can plausibly be contended that defendant is liable under the facts shown by this record is, that Thomson was struck east of the whistling post; that the statute required a bell to be rung or a whistle sounded from the whistling post to the highway; that a rule of the company required the whistle to be sounded at all whistling posts and the engine bell to be rung on approaching such whistling post; that another rule of the company required the headlight on the engine to be kept lighted when fog rendered it necessary; that employes at work on the road between such whistling post and the highway have a right to rely upon the giving of these signals; that these signals were not given at that time, and that in consequence of that failure Thomson lost his life. Defendant contends that these regulations are only for the benefit of travelers upon the highway and relies upon *Williams v. C. & A. R. R. Co.*, 135 Ill. 491; *C. & A. R. R. Co. v. Sanders*, 154 Ill. 531; *C., C., C. & St. L. Ry. Co. v. Halbert*, 179 Ill. 196; *W. Chi. St. R. R.*

Co. v. Tuerk, 193 Ill. 385; and certain Appellate Court decisions. Without discussing these cases to show that they differ in principle from the one before us, we think it sufficient to say that we consider it the settled law of this state that workmen upon a railroad have a right to expect that the master and its other servants operating trains will obey the statute and the rules of the company and will give signals and warnings as required by the statute and such rules. I. C. R. R. Co. v. Gilbert, 157 Ill. 354; St. L., A. & T. H. R. R. Co. v. Eggmann, 161 Ill. 155; E. St. L. Ry. Co. v. Eggmann, 170 Ill. 538; C. & A. R. R. Co. v. Kelly, 182 Ill. 267; C. & A. R. R. Co. v. Eaton, 194 Ill. 441; Otstot v. I. I. & I. R. R. Co., 103 Ill. App. 136; I. I. & I. R. R. Co. v. Otstot, 113 Ill. App. 37. There seems to us to be a clear preponderance of the proof that the bell was ringing continuously by automatic action and that the headlight was burning. The proof on the question whether the whistle was blown at the whistling post was so conflicting that it may be the conclusion of the jury thereon, approved by the trial judge, ought not to be disturbed by this court.

But the question remains, were the jury warranted in finding, as they must have done to warrant their verdict, that Thomson was exercising due care for his own safety, and that the violation of the statute and the rules, if they were violated, caused his death? Thomson was of full age, in the possession of his faculties, was familiar with work on the section and with the dangers of railroading, knew of the fog and its density and must be presumed to have known that the smoke from the freight train settled upon the north track. When he went east on that track he knew that it was the track upon which all eastbound trains traveled, and that if any train came over that track it would come from behind him. He must have known that if it displayed a headlight in the fog he would be unable to see it, both because it would be behind him,

and also because the fog was so dense that, according to plaintiff's witnesses, a headlight could be seen no further than any other object, and an object could not be seen further than fifty to one hundred feet according to most of the witnesses, and not to exceeding two hundred feet at the highest estimate. The proof shows that there were frequently extras and specials passing over the road and trains behind time. The proof already referred to shows that he knew that no notice would be given the men on the section that any such trains were passing over the road, but they were required to depend upon their own faculties to ascertain the approach of all trains and to keep out of their way. Sixty miles per hour was the regular rate of speed of this fast mail, or eighty-eight feet per second. Thomson was struck 387.4 feet east of the whistling post. The train, therefore, traveled the distance from the whistling post to where it struck Thomson in four and four-tenths seconds. The freight train was running from twenty to twenty-five miles per hour and the noise of that train was likely to drown the noise and the signals of any train approaching from the rear, and he, as a man experienced in railroading, must have known that fact. About 1,600 feet back of where the train struck Thomson it passed over a bridge about 150 feet long, crossing a stream called the Elkhorn river. It is common knowledge that a fast train makes much more noise or that its sound is heard much further when crossing a bridge elevated over a stream than when running upon the level ground. The sound of this train upon the bridge was heard by others, but apparently not by Thomson, for in the eighteen seconds which it took that train to run the distance from the bridge to Thomson, he might have got off the track if he had acted promptly. It seems to us clear that no reasonable mind could conclude that a man with the knowledge Thomson had and with the fog then prevailing, and in the smoke and noise of the passing

freight train, could go upon that north track and walk in the same direction trains thereon ran and rely upon the ringing of a bell or the sounding of a whistle at a point less than four and one-half seconds back of him, or rely upon the display of a headlight back of him, and be in the exercise of ordinary care for his own safety. In our judgment the only conclusion to be drawn from this testimony is that Thomson did not exercise ordinary care for his own safety, that his unfortunate death was due entirely to his own great carelessness, and that therefore his administratrix has no cause of action.

The judgment is, therefore, reversed.

Reversed.

Finding of facts to be incorporated in the judgment of the court: We find that deceased at the time he was killed was not in the exercise of ordinary care for his own safety, and that he lost his life in consequence of his own negligence.

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Gen. No. 4,700.

1. VERDICT—*jury should not be required to render more than one.* It is improper to require a jury to render more than one verdict in a single cause, as, in this case, to direct a verdict and have the jury return a verdict as to one defendant before the conclusion of the case as to the other.

2. JURISDICTION—*when not lost notwithstanding judgment in favor of resident defendant.* Where two defendants, one a resident of the county in which such action is brought and the other a non-resident of such county, are joined, judgment is properly rendered against the non-resident defendant, where such defendant appears and defends the action, regardless of the disposition of the case as to the other defendant.

3. BILL OF LADING—*how to be construed.* A bill of lading having been prepared by the carrier, is to be construed most strongly against it.

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4. FREIGHT—*carrier may demand prepayment of.* A carrier is within its rights in demanding that freight charges be paid by the shipper in advance.

5. DECLARATION—*how far allegations of, must be proven in action of tort.* In an action of tort, the plaintiff need only prove enough of the averments of its declarations to establish a cause of action.

Action on the case. Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1906. Affirmed upon *remittitur*. Opinion filed October 16, 1906.

ULLMAN & HACKER and PAGE & WEAD, for appellant.

SHEEN, MILLER & DAVID, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is an action on the case brought in the Circuit Court of Peoria county by the Post Sugar Company, Limited, a partnership, against the Lehigh Valley Transportation Company and the Chicago Rock Island and Pacific Railway Company, hereinafter referred to as the transportation company and the railway company, respectively, to recover for the loss of fifty cases of chocolate shipped by Wilbur & Sons from Philadelphia to plaintiff at Peoria Heights, Illinois, and which never reached its destination. The first count of the declaration as amended set up the bill of lading and charged a failure to deliver thereunder. The second count as amended charged that the defendants received these goods to be safely carried from Philadelphia to Prospect Heights, Peoria, and a failure to perform due to the negligence of the defendants and the loss of the goods thereby. The goods were in fact billed to Peoria Heights, but no point is made here upon the difference between Prospect Heights in the declaration and Peoria Heights in the proof. Defendant pleaded the general issue. Upon a jury trial, at the close of plaintiff's proofs, the railway company,

under an instruction given by the court at its request, was found not guilty, and thereupon the transportation company asked leave to withdraw its plea in bar and to file a plea to the jurisdiction of the court. That motion was denied. It then asked the court to instruct the jury to find it not guilty, and that motion was denied. The same motion to instruct for defendant was made and denied at the close of all the proofs. Plaintiff had a verdict for \$1,195.94. Plaintiff moved for a new trial as to the railway company, and the transportation company also moved for a new trial. Both motions were denied, and plaintiff had judgment on the verdict against the transportation company, from which it appeals.

Did the court err in not permitting appellant to withdraw its plea in bar and to file a plea to the jurisdiction of the court? It is to be noted that appellant did not except to the action of the court in directing a verdict for the railway company, and did not make that action one of the grounds of its motion for a new trial, and has not assigned that action as error. Appellee has not assigned cross-errors. The action of the court as to the railway company is, therefore, acquiesced in by all parties here. When appellant asked leave to plead to the jurisdiction of the court the railway company was still in court. It only had a verdict. The action of the court in causing a verdict to be rendered as to one defendant before the completion of the trial as to the other defendant, was not warranted by common law practice or by any statute of which we are aware. In our opinion a jury should not be called upon to render two verdicts at different times in the same case, and when the court decided it could not then dispose of the case as to all defendants, action upon the motion and instruction presented by the railway company should have been withheld until the close of the case. But this was a mere irregularity. Plaintiff made a motion for a new trial as to the railway

company and filed points in support thereof. The motion by plaintiff for a new trial as to the railway company, was denied on the same day that the motion of appellant for a new trial was denied, and there was a judgment for the railway company for its costs on the same day that there was a judgment against appellant. Until that time both defendants were in court. When appellant asked leave to plead to the jurisdiction, it could not be known that the verdict for the railway company might not be set aside. The railway company was served in Peoria county, where the suit was brought. Appellant was served in Cook county and was not found or served in Peoria county. Section two of the Practice Act provides that where there is more than one defendant, such an action may be brought in the county where either defendant resides, and the plaintiff may have a writ for the non-resident defendant to the county where he resides, and that if a verdict shall not be found or a judgment rendered against the resident defendant, judgment shall not be rendered against the non-resident defendant, unless he appears and defends the action. Appellant did appear and defend the action, and the language of the statute, therefore, permits a judgment against it. In *Hobson v. Tritt*, 69 Ill. App. 215, plaintiff dismissed his suit as to the resident defendant, and it was held that the non-resident defendant was then entitled to withdraw his plea to the merits and to file a plea to the jurisdiction. That was necessary to prevent a defendant from being entrapped. That case is unlike the one before us, where the resident defendant participated in the trial and remained in the cause till final judgment as to both defendants. Indeed that case recognizes that in such a case as this the non-resident defendant cannot avoid the jurisdiction of the court after having appeared and defended.

Appellee ordered fifty cases of chocolate of Wilbur & Sons of Philadelphia, to be shipped to it at Peoria

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Heights via the Chicago, Rock Island & Pacific Railway Company. The goods were delivered to an agent in Philadelphia, who issued first a receipt and afterwards a bill of lading for the goods, and they were so transported that they reached Chicago in charge of appellant in one of its boats. A teamster hauled the goods to the freight depot of the railway company in Chicago. Peoria Heights was a place near Peoria where the railway company had no agent. Its rule, therefore, was to require prepayment of freight shipped to that point. Peoria Heights was for that reason called a "prepay station." The freight agent of the railway company in Chicago informed the teamster that the railway company would not receive the goods for transportation till its freight charges were prepaid. The goods were left by the teamster inside the warehouse. The railway company from that time on treated the goods as in its hands as warehouseman, and refused to issue a receipt for them or to forward them till its freight was prepaid. The freight was never prepaid, and the goods were not forwarded. A few days later there was a fire in the freight house of the railway company, and these goods appeared to be slightly injured by water used in extinguishing the fire. Conversations over the telephone and correspondence followed. Some one at the office of the railway company had just told some one at the office of appellant that the railway company would arrange to forward the goods and collect the freight at the destination. when the railway official learned of the fire and its possible results to these goods, and the proposition was immediately rescinded. There was much correspondence between plaintiff, the railway company and appellant, but plaintiff was unable to get the property. The railway company refused to transport the goods as a carrier, for fear if they were found to be damaged at the destination it would be held liable as a common

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carrier, whereas it claimed its liability, if any, was only that of a warehouseman. It offered to deliver the goods to plaintiff in Chicago, or to any one else, on the order of appellant. Appellant declared it had delivered the goods to the railway company and had no further responsibility for them. What finally became of the goods does not appear, but plaintiff has never received them.

Appellant insists that the bill of lading introduced in evidence was not issued by it. Its heading reads as follows:

**“LEHIGH VALLEY TRANSPORTATION COMPANY
RAIL AND LAKE**

VIA PHILADELPHIA & READING RAILWAY COMPANY. . .

For rates and other information apply to office of Lehigh Valley Transportation Company, 716 Chestnut Street.

W. P. HENRY, Manager, Buffalo, N. Y.

GEO. W. MITCHELL, Agent, Philadelphia.”

It is said in appellee's brief that on said bill of lading in evidence the words, “Lehigh Valley Transportation Company” are in large type, and that the words, “Philadelphia & Reading Railway Company” are in much smaller type, but this does not appear in the record before us. The bill of lading is signed, “G. M. Supplee, Agent,” and below that signature are these words: “The signature of the agent here acknowledges only the receipt of the property and the charges advanced, if any.” Beneath this the rate of freight on this shipment from Philadelphia to Peoria, Illinois, is stated, and that is signed “G. W. Mitchell, Agent, D.” Beneath that signature are these words: “The signature of the agent here acknowledges only the rate given.” Appellant owned a line of boats plying from Buffalo to Chicago, and its boat line did not reach Philadelphia. There was oral proof that appellant had an office in Philadelphia, and that it connected from Philadelphia over the Philadelphia & Reading Rail-

road and the Lehigh Valley Railroad, and that appellant had a freight soliciting agent in Philadelphia. There was oral proof that appellant operated over the Philadelphia & Reading Railroad. A witness for defendant testified that Mitchell was an agent for the Lehigh Valley Railroad Company to solicit west-bound freight for that railroad company to be delivered to the appellant at Buffalo, and that he had no other duties concerning the appellant, but this witness afterwards admitted that he had no personal knowledge of what Mitchell's powers were concerning the appellant, and that testimony as to Mitchell's authority was excluded. There were letters in evidence written at Chicago by the agent there of appellant, and the letter-head upon which those letters were written contained the names of both the appellant and the Lehigh Valley Railroad Company, and it showed that they had the same office and agent in Chicago. There are other facts and circumstances appearing throughout the record to support our conclusion that this was the bill of lading of appellant.

The bill of lading stated on its face "that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted by himself and his assigns as just and reasonable." In said bill of lading the company agreed to carry the property therein described "to said destination, if on its road, otherwise to deliver to another carrier on the route to said destination." Appellant introduced in evidence certain printed matter on the back of the bill of lading, headed "Uniform Bill of Lading Conditions," among which were the following:

"1. No carrier or party in possession of all or any property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control or by floods or fire.

"2. No carrier is bound to carry said property by any particular train or vessel or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit.

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable, shall be computed at the value of the property at the place and time of shipment."

It is claimed by appellant that by the rules of law prevailing in Pennsylvania where this contract was executed the express assent of a shipper to limitations in a bill of lading is not necessary, but that mere notice thereof to the shipper binds him (*Camden & Amboy R. R. Co. v. Baldauf*, 16 Pa. St. 67; *Verner v. Sweitzer*, 32 Pa. St. 208; *Pa. Cent. R. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; and *Farnham v. Camden & Amboy R. R. Co.*, 55 Pa. St. 53), that the laws of Pennsylvania control the force and effect of the contract (*Merchants' Despatch Transportation Co. v. Furthmann*, 149 Ill. 68), and that, therefore, the conditions printed in the bill of lading and on the back thereof bind the shipper and therefore bind the consignee. We assent to these propositions. By the face of the contract plaintiff agreed "to deliver to another carrier on the route to said destination." By condition No. 3 on the back of the contract the carrier was not to be liable for loss or damage "after said property is ready for delivery to the next carrier." Thereupon appellant argues (a) that it was not liable, because it was ready to deliver the property to the next carrier; and that if this position is not sound, then (b) that it is not liable, because it did deliver the property to the next carrier. This is a printed contract prepared by the carrier, and if there is any conflict between its different parts, that interpretation should be adopted which is most in harmony with the purpose

and effect of the agreement, which was to carry the goods from the shipper to the consignee and safely deliver them to the latter. This principle of construing equivocal expressions in a contract against the party who prepared it, is often applied in the case of insurance policies. *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Niagara Fire Ins. Co. v. Heenan*, 81 Ill. App. 678. We, therefore, construe this contract to require appellant to deliver the goods to the next carrier.

Did appellant deliver the goods to the railway company? The railway company demanded prepayment of freight and refused to receive the goods for shipment till the freight was prepaid, but permitted them to be stored in its warehouse while awaiting prepayment of the charges, and such charges never were prepaid and it never received the property for shipment. The reason the railway company assigned for this refusal was, that this was a "prepay station," or a station at which they had no agent to collect charges, and therefore their rules required them to collect the charges in advance. It appeared that the consignee had some general arrangement with the agent of the railway company at Peoria by which he was permitted to receive freight at Peoria Heights and pay the charges afterwards to the Peoria office; and it is true that the knowledge of the agent at Peoria was the knowledge of the railway company itself. We regard these facts as immaterial as between appellant and the consignee. The material fact here is that the railway company did demand the freight charges in advance and did refuse to receive the property for transportation till the charges were prepaid. Even if it had a different prior practice with appellee that was only for appellee's accommodation, and it had a right to abandon that practice at any time. It had a right to demand prepayment. Its demand was not unreasonable. Appellee proved a custom that where goods are transported to a connecting line, if the connecting carrier requires the payment of freight in advance, the deliv-

ering line shall pay it. But we regard that as unimportant. As the appellant had agreed to deliver the goods to the next carrier, it had thereby agreed to do whatever was necessary to effect such delivery. It is also to be noted in this connection that appellant by its bill of lading had fixed a through rate for this freight from Philadelphia to Peoria, which rate it was bound to secure to the consignee. If it had not been the duty of appellant to prepay the freight, it would have been its duty at least to notify the parties in interest at once, that they might take some action. Five days intervened between the time the goods were left in the warehouse of the railway company and the time of the fire, and appellant had not notified either consignee or shipper. We are of opinion that the proof showed that the appellant had not delivered the goods to the next carrier, and that it was liable for the loss.

Appellant asserts that there is a clause in this contract which exonerates the carrier from liability for loss or damage, unless a claim in writing therefor is made within thirty days after due time for the delivery of the property, and that no such claim in writing within thirty days was shown, and that, therefore, plaintiff was not entitled to recover. We find nothing in the abstract to show that this point was made in the court below, and apparently appellant did not originally intend to make the point here, as we do not find that clause of the contract in the abstract. As the abstract does not show that the question was raised in the court below and does not set out any such clause of the contract, we do not feel called upon to discuss that proposition, further than to say that we think the evidence discloses reasons for holding the position untenable.

It is claimed that there is a variance between the proofs and the amended first count of the declaration. This was an action of tort against two defendants, and the same rule was not applicable as in assumpsit, and in order to entitle appellee to recover against appel-

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lant, it was not necessary to prove a joint liability, though such liability was averred. *I. C. R. R. Co. v. Foulks*, 191 Ill. 57, is an illustration of the rule. Some of the averments of the amended first count were not established, but enough of those averments were proved to make a case against appellant.

Some of the criticisms upon the instructions may be well founded, but they did not lead to an erroneous result, except in one particular. The proof satisfies us that (excluding the question of freight charges) the value of the goods as shipped, both at Philadelphia and at Peoria Heights, was \$1,075. But there was proof that they were to some extent damaged by moisture at the time of the fire, and we think appellant was not liable for that loss under a fair construction of the first condition on the back of the contract, as above quoted. The amount of that loss should have been left to the jury. It was taken from them by instructions given at appellee's request. While the witness on that subject once placed the damage at "ten or fifteen per cent." yet when his entire evidence is read together, it is evident it would not have warranted the jury in placing that loss at more than ten per cent. They might fairly put the loss at much less, but they could have put it as high as ten per cent. For the error of the instructions in excluding that element from the jury, the judgment must be reversed, unless appellee will correct it here, at its costs.

This opinion will be lodged with the clerk, without filing, and the parties will be notified, and if within seven days thereafter appellee files herein a *remittitur* of \$119.59 of the judgment, the judgment will be affirmed in the sum of \$1,076.35 at the costs of appellee; and if not, the judgment will be reversed and the cause remanded for a new trial.

Appellee having afterwards filed a *remittitur* of \$119.59 of the judgment, said judgment is now affirmed in the sum of \$1,076.35, at the costs of appellee.

Affirmed upon remittitur.

Fish v. Lapsley.

Arthur Fish v. David Lapsley.**Gen. No. 4,702.**

1. JURISDICTION—*how question of, upon ground that action involved partnership accounting, should be raised.* This question should be raised in the trial court and cannot be first raised upon appeal. It is not raised in the trial court merely by motion to exclude the evidence.

2. MOTION FOR NEW TRIAL—*grounds not specified in written, deemed waived.* Where a written motion for a new trial is filed specifying points, any points omitted are deemed to have been waived.

Action of assumpsit. Appeal from the Circuit Court of Kankakee county; the Hon. F. L. HOOPER, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

CHARLES B. CAMPBELL, for appellant.

W. R. HUNTER, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Lapsley sued Fish in the Circuit Court, and had a verdict and a judgment for \$151, and Fish appeals. The parties live at Momence, in Kankakee county. They agreed to go to Montana and buy a bunch of horses, and to ship them home and sell them, and to share equally the cost, expenses, profits and losses. The money was obtained from a Momence bank on a note signed by Fish only. They went to Montana, bought horses and paid for them, shipped them to Momence, put them upon land owned by Fish, advertised to sell them at public sale, held a public sale and sold about half of the horses, and stopped the sale because the prices obtained were not satisfactory. Fish received the proceeds of the sale. The next day they entered into a verbal contract, about the terms of which they differ. The substance of the testimony given by Lapsley on this subject was that it was

agreed that Fish should refund to Lapsley the car fare of the latter on the Montana trip and should pay Lapsley \$15 for his interest in the horses remaining unsold, and that Lapsley should turn over to Fish a note and a mortgage which Lapsley had taken for a horse he had privately sold. Lapsley was partially corroborated by one witness. The substance of the testimony given by Fish on the subject was that they agreed that Lapsley should sell his interest in the entire venture to Fish for \$15 and the return of his car fare on the Montana trip, and that Lapsley should turn over to Fish the note and mortgage. Fish was partially corroborated by one witness. After that agreement was made Lapsley brought this suit.

Each party introduced proof of the cost of the horses that had been sold, and of the expenses incurred in connection therewith, and of the price at which they were sold, thus laying the foundation from which to calculate whether a profit was made on the horses which were sold, and if so, the amount of such profit. Fish argues here that if his version of the contract was a true one, then Lapsley could only recover \$15 and the railroad fare, which sum would be much less than the verdict. This contention is correct. He also justly argues that if he understood the proposed bargain in one way and if Lapsley understood it differently, then the minds of the parties did not meet, and there was no contract. But as the verdict is warranted only upon Lapsley's version of the contract, we must assume the jury believed Lapsley's testimony on that subject. As each party was partially corroborated by a single witness, we see no reason why we should disturb the conclusion of the jury as to the weight of the evidence on this question.

Fish, however, contends that if Lapsley's version of the contract is true, and if, besides the \$15 and the car fare, he is also liable to Lapsley for one-half the profits on the horses which were sold, then the accounting

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necessary to ascertain the profits relates to a partnership matter which cannot be adjusted in this action at law. Lapsley, on the contrary, contends here that this rule does not apply to a single transaction, and relies upon *Hurley v. Walton*, 63 Ill. 260; *Gottschalk v. Smith*, 156 Ill. 377; *Southworth v. The People*, 183 Ill. 621. To these authorities may be added 2 *Bates on Partnership*, sec. 865. Regardless of this position we consider it a conclusive answer to the present contention by Fish, that the point was not made in the court below, and its ruling presented for review here, that plaintiff was seeking to recover upon a partnership transaction of which the court could not take cognizance in a court of law. Plaintiff's proof on this subject went in without objection. At the close of plaintiff's proof defendant moved to exclude all plaintiff's evidence, and this was denied. This did not raise the present question, for it covered not only the proof of profits on the horses sold, but also the proof of a contract to pay \$15 and to refund the car fare. Then defendant moved to exclude plaintiff's proof as to the price paid for the horses and the price they sold for and the items of expense. This motion was denied. The record does not show that it was disclosed to the court that this proof should be excluded because it related to a partnership transaction, and it may well be doubted whether this motion was sufficient to raise the question. But if it was, this was afterwards waived, for the refusal to exclude this testimony was not embraced in the points subsequently filed by defendant upon his motion for a new trial. A party filing a written motion for a new trial and stating therein the grounds upon which he seeks for a new trial, waives all reasons for a new trial not set forth in the motion. *West Chicago St. R. R. Co. v. Krueger*, 168 Ill. 586; *Ill. Cent. R. R. Co. v. Johnson*, 191 Ill. 594. Therefore, if the court erred in refusing to exclude that proof, that error was waived. The court gave the third in-

struction requested by plaintiff, and that instruction was based on the right of plaintiff to recover his share of the profits, if any, on the horses sold. But before that instruction was given defendant had gone fully into proof on his side as to the cost and selling price of the horses sold and as to the expenses, and after both sides had put in that testimony without objection, it was proper to instruct the jury as to the law on that subject. We regard it as too late to now raise the question that the court had no jurisdiction to permit a recovery in this action for the profits realized upon the horses sold. The attorney who raises this question here did not try the cause below.

It is not contended that the verdict is excessive, if Lapsley's version of the second contract is correct, and if the profits upon the horses sold may be allowed in this suit. In fact, the verdict seems to be slightly under the amount shown to be due plaintiff, on that basis.

The judgment is, therefore, affirmed.

Affirmed.

William Bache et al. v. Nathaniel S. Ward, Executor.

Gen. No. 4,690.

1. **STATUTE OF DESCENT—section 11 construed.** Where property is left to a class and one of such class dies before the testator leaving issue, such issue stands in the stead of the deceased ancestor; but if such member of such class dies before the testator without issue, the share of such member becomes and is distributed as intestate estate.

2. **REVIEW—what not subject to.** Only those questions which were raised in and presented to the trial court are subject to review on appeal.

Contested claim in court of probate. Appeal from the Circuit Court of Bureau county; the Hon. RICHARD M. SKINNER, Judge, presiding. Heard in this court at the April term, 1906. **Affirmed.** Opinion filed October 16, 1906.

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JULIUS and LESSING ROSENTHAL, for appellants.

HORACE R. BROWN and WATTS R. JOHNSON, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Joseph Ward of Bureau county died July 18, 1903, leaving a last will executed September 30, 1895, which was duly admitted to probate. His son, Nathaniel S. Ward, was executor. The first clause of the will related to debts and funeral expenses, and the thirteenth required his children to pay notes he held against them. By clauses 2 to 10 inclusive, the testator made a devise or a bequest to each of his nine living children. The 11th, 12th and 14th clauses were as follows:

“Eleventh. I give and bequeath unto the three children of my deceased daughter, Mary M. Bache, to wit, William Bache, Joseph Bache and John Bache, the sum of two hundred (200) dollars each absolutely and forever.”

“Twelfth. I give and bequeath unto the child of my deceased daughter, Julia A. Criswell, to wit, Charles Criswell, the sum of five hundred (500) dollars absolutely and forever.”

“Fourteenth. All the rest, residue and remainder of my property and estate not herein disposed of I give, bequeath and devise absolutely and forever as follows, to wit: One-eleventh (1-11) thereof to said John R. Ward; one-eleventh (1-11) thereof to said Sarah C. White; one-eleventh (1-11) thereof to said Nathaniel S. Ward; one-eleventh (1-11) thereof to said Violet D. Clark; one-eleventh (1-11) thereof to said Minnie L. Clark; one-eleventh (1-11) thereof to said Myrtle S. Warkins; one-eleventh (1-11) thereof to said Milton E. Ward; one-eleventh (1-11) thereof to said Harriet A. Taylor; one-eleventh (1-11) thereof to said William G. Ward; one-eleventh (1-11) thereof to said William, Joseph and John Bache, and one-eleventh (1-11) thereof to said Charles Criswell.”

The first nine persons named in said fourteenth

clause were the nine living children of the testator.

John Bache, one of the grandsons named in the 11th and 14th clauses, died without issue about six months before the death of the testator. The will made no provision for that contingency. Section 11 of our Statute of Descent is as follows:

“Sec. 11. Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate.”

William and Joseph Bache filed objections in the County Court to the final report of the executor, raising questions not involved in the present appeal, and also claiming that they were entitled to the \$200 given John Bache by the 11th clause of the will and to the one-third of one-eleventh of the residue given him by the 14th clause. They appealed to the Circuit Court from an adverse decision of the County Court, and their contention being again disallowed, they now appeal to this court. The holdings of the trial courts were, that the shares given John Bache became intestate estate under section 11 of said statute, because he died without issue prior to the death of the testator. The report showed that the residue was personal property only, so that this court has jurisdiction.

Several of the children were each given forty acres of land without qualification. One child was given forty acres, subject to a charge of \$1,200. Another child was given a larger tract of land subject to a charge of \$900. Two children were given \$2,400 each without any land. The will gave the children of testa-

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tor's deceased daughter Mrs. Bache, \$600 in all, and to the child of his deceased daughter Mrs. Criswell, \$500. It not only thus appears that he made an unequal distribution of the bulk of his estate, but it was also proved by oral testimony that the devises of real estate to the several children were not of equal but of different values. So far as relates to the gift of \$200 to John Bache by the 11th clause, we find nothing in the will to indicate that it was given to a class, or anything showing any intention of the testator which would interfere with the application thereto of said section 11 of the Statute of Descent, and we are of opinion that the trial courts properly held that said \$200 should be distributed as intestate estate.

It is, however, contended that from a consideration of the contents of the will and of the facts above recited and of proof made that the testator left surviving him eleven lines of descent, it clearly appears that the testator intended to give the residue of his estate to his living children and to the issue of his deceased children *per stirpes*; that he intended the children of Mrs. Bache to take as a class, and that, therefore, those of that class who survived the testator took the entire gift to that class; that therefore, under the rules of law governing the construction of wills, all said one-eleventh of the residue passed by the will itself to William and Joseph Bache and hence no occasion arose for the application of section 11 of the Statute of Descent; and also that said statute should not be applied to defeat the intention of the testator, and that the intention of the testator that his descendants should take the residue *per stirpes* being clearly disclosed, the application of the statute would defeat that intention, and should therefore be refused. Our conclusion, however, is that *Rudolph v. Rudolph*, 207 Ill. 266, must be regarded as decisive in favor of the judgment of the lower courts. In the *Rudolph* case the testator provided that, after the death of his wife, all his property

should go "to my beloved children, as their absolute property in fee simple, to be equally divided between them." The will did not name the children nor state their number. The testator had had four children while the will was in his hands, but one of his sons died about two years before the death of the testator, leaving children surviving him. It was contended that the devise was to a class, and that by the death of one of that class before the death of the testator, the entire devise passed to the survivors of the class, and that therefore the will disposed of the entire estate to those who survived the testator, and therefore there was no occasion to apply the statute. It was conceded by the court that these contentions were sound, if section 11 of the Statute of Descent did not apply, but it was held that it did apply, and therefore the children of the son who died before the testator took that share to the exclusion of the surviving members of the class. It is therefore clear that, under the principles announced in the Rudolph case, if John Bache had left children surviving him and surviving the testator, they would have taken his one-third of one-eleventh of the residue to the exclusion of the other members of the class to which John Bache belonged. Notwithstanding the ingenious argument of counsel for appellants, we have been unable to discover any satisfactory authority or course of reasoning to support their position that, though the statute would apply to this case if John Bache had left issue, yet it will not apply to this case where he left no issue. The statute applies by its terms to every case where a child or grandchild is made a devisee or legatee in a will, and dies before the testator and no provision has been made for such a contingency. John Bache was a child of the testator; he was named as a legatee in the will; he died before the testator and no provision has been made for that contingency. All the conditions exist which make the statute applicable. How the share given John Bache

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by the will shall be distributed under the statute, depends upon whether he left issue which survived the testator. If he did, it goes to that issue. If he did not, it is to be distributed as intestate estate. But the question whether the statute shall be applied in no way depends upon the question whether he left issue surviving. It is also to be presumed that the testator was acquainted with this statute, and intended that it should prevail in case a contingency arose for which he had made no provision in his will. We are of opinion that the trial courts properly treated the share given John Bache as intestate estate.

Appellants argue that they should have been allowed attorney's fees and costs. We do not find that they asked for an allowance for attorney's fees in the courts below, or that said courts were asked to pass upon any such question. We only sit to review the action of the Circuit Court, and the question whether appellants were entitled to an allowance for attorney's fees is not presented by this record. They claimed a larger share of the estate than the executor's final report stated that they were entitled to receive. They were defeated in that contention, and we see no reason why they were not properly adjudged to pay the costs. There was no ambiguity in this will nor in the statute, and this was not a bill to construe the will. If a legatee were allowed attorney's fees whenever he claimed more than he was entitled to receive, a temptation to unnecessary litigation would be presented.

The order of the Circuit Court is affirmed.

Affirmed.

Belvidere City Railway Company v. George W. Bute.**Gen. No. 4,626.**

1. VERDICT—*when excessive*. A verdict of \$2,000 held excessive where it appeared that the injury, if any, was slight and is likely to have resulted from old age or causes other than the accident complained of.

2. FRANCHISE ORDINANCE—*when exclusion of, not error*. An ordinance giving a traction company defendant the right to operate its cars upon a public street is not improperly excluded where such right is not put in issue in the trial of the case in which the ordinance in question is sought to be introduced.

3. INSTRUCTIONS—*must not ignore issues*. An instruction which undertakes to sum up the entire cause must not ignore any issue material to the cause.

4. INSTRUCTIONS—*what does not cure errors in*. An error in one instruction which directs a verdict is not cured by another instruction upon the same subject which is correct in its statement of law, as it is impossible to determine which instruction was adopted and followed by the jury.

Action in case for personal injuries. Appeal from the Circuit Court of Boone county; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed October 16, 1906.

JOHN A. ROSE and ALBERT M. CROSS, for appellant;
FULLER & ISRAEL, of counsel.

J. M. HUFF and R. K. WELSH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

State street in the city of Belvidere runs north and south. A single track street railway operated by the Belvidere City Railway Company runs along the street. The street crosses the Kishwaukee river upon a bridge. The street railway has a switch track which begins on one side of the bridge and ends on the other, so that upon the bridge it has a double track, and teams traveling upon the bridge must go along one of the

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tracks. On January 19, 1904, George W. Bute, then nearly sixty years old, loaded a wagon with two tons of nut coal at yards south of the river and east of State street, and started home with it. He drove west to State street and then turned north, and as he approached the bridge he looked back and saw a car headed towards him. Sometimes he testified that it was approaching and at other times that he did not know whether it was in motion. He drove upon the track and upon the bridge. The wagon box was full and the coal was heaped up. Bute had no wagon seat, but sat upon the front of the load of coal, with his legs hanging down in front of the wagon box. The street car, propelled by electric power, came up behind him and struck the wagon and drove it forward three or four feet, and Bute claims he fell back upon the coal, though without losing his hold upon the reins. The neck yoke and the slats on the side boards of the wagon were broken by the force of the collision. Bute owned the coal, but did not own the team or wagon. He got another neck yoke, drove home, unloaded the coal, returned the wagon and team to their owners, and then went home and called a physician, who attended him. No bones were broken, the skin was not lacerated, and no discoloration of the skin or flesh has ever been found. He complained of soreness to the touch and flinched when certain places upon his back were pressed. He remained in bed several days, and ever since has walked with crutches. He testified that he suffered severe pain and was unable to work. He has done no work since, and claims he was seriously and permanently injured. He brought this suit against the street railway company to recover damages for such injuries. His declaration charged that defendant ran the street car carelessly, negligently and recklessly, and at a high and dangerous rate of speed and without having the same under control, against the rear end of plaintiff's wagon with such force and violence

that he was thrown backwards into the wagon and into the materials therein, and thereby was severely and permanently injured. Defendant pleaded the general issue. There was a trial and a verdict for plaintiff for \$2,000. A motion by defendant for a new trial was denied. Plaintiff had judgment on the verdict, and defendant appeals.

Upon a careful consideration of the evidence we are of opinion that it did not warrant the jury in finding that this very slight accident, by which plaintiff, while sitting upon the coal, was tipped or thrown back upon the small nut coal heaped behind him, caused the serious physical pain and condition of permanent physical disability of which plaintiff now complains. From the proofs we conclude that his condition is due to old age, muscular rheumatism or other difficulties for which defendant is not in any way responsible, or else that he is feigning or imagining a large part of his suffering. Those medical witnesses who concluded he was suffering, and who testified that his condition might have been caused by falling back upon the coal, based their conclusions in the main upon his statements. The physician who attended him the first few days did not consider that he was seriously injured. Under the proof now before us we think the verdict for \$2,000 was excessive, and that the cause should be submitted to another jury.

Defendant offered the ordinance by which it obtained a right to run upon this street, but the court sustained an objection thereto. Plaintiff did not allege or claim that defendant was wrongfully in the street, and that question was not at issue, and the proof was therefore immaterial. Section 10 of that ordinance gave the cars of defendant the right of way as against teams and conveyances traveling on the street, and it is urged that this was competent proof for defendant. This section either did or did not enlarge the legal rights and liabilities of the parties. If

it did not, then the proof was immaterial. If it was intended by the ordinance to enact that one is negligent who drives upon a street car track in front of an approaching car, when under the existing circumstances he would not be negligent by the general rules of law, then we are of opinion that the ordinance was properly rejected for the reasons stated by us in *Rockford City Ry. Co. v. Blake*, 74 Ill. App. 175, and by the Supreme Court in the same case in 173 Ill. 354. But if section 10 of the ordinance should have been admitted, the court gave instructions requested by defendant which stated the rights and liabilities of the parties as broadly as that section undertook to fix them, and defendant was not harmed by the rejection of the ordinance.

The proof was contradictory as to the distance between the plaintiff and the car when he drove in front of it, and as to the speed at which it was then moving. The proof on that subject introduced by defendant, presented the question whether or not plaintiff was guilty of contributory negligence in driving upon the track in front of the car. One or more instructions given at plaintiff's request related to the question whether plaintiff was negligent in driving along the track, and stated his rights while driving along the track, and directed a verdict for plaintiff if the jury found the facts as therein stated, but ignored the question whether plaintiff was guilty of negligence in driving upon the track just in front of a car he knew was approaching, if he did so drive. This was error. While a plaintiff may base his instructions upon his own version of the proofs, yet if he directs a verdict in such instructions he may not ignore proof tending to establish a defense. An erroneous instruction which directs a verdict is not cured by another and correct instruction upon the same subject, for it cannot be known which instruction the jury followed, and the verdict may have been based upon the erroneous in-

struction. Other instructions given at plaintiff's request are subject to serious criticisms, but plaintiff is likely to avoid them at another trial, and they do not require discussion. The two instructions requested by defendant and refused, were in the nature of arguments and were properly refused.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Henry Wolber et al. v. Jacob Chambers.

Gen. No. 4.671.

1. REAL ESTATE COMMISSIONS—*revocation of authority discharges right to.* Where before the broker obtains a purchaser his authority is revoked, no right to commissions attaches.

2. REAL ESTATE COMMISSIONS—*what essential to right to.* Before a broker is entitled to his commissions for obtaining a purchaser, he must obtain a purchaser who is ready, willing and able to purchase the property in question upon the terms of sale offered by the owner.

Action of assumpsit. Appeal from the Circuit Court of Carroll county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

ORION M. GROVE, for appellants; GEORGE L. HOFFMAN, of counsel.

W. H. A. RENNER and FREDERICK S. SMITH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Jacob Chambers owned a farm, and placed it with Wolber & Pittman, real estate dealers, for sale on commission. They found a purchaser and prepared a contract and presented it to Chambers, and he refused to

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sign it and refused to sell the farm. They then brought this suit against Chambers to recover the agreed commission. There was a jury trial and a verdict and a judgment for defendant. Plaintiffs appeal.

There is so clear a preponderance of the evidence that before plaintiffs found a purchaser defendant revoked their authority to sell the farm and told them not to sell it, that if the jury had found for plaintiffs the verdict could not have been sustained. The proposed contract was upon terms different in several respects from those upon which plaintiffs had been authorized to sell, and the court gave instructions requested by defendant which made it necessary to a recovery that plaintiffs should prove that they procured a purchaser ready, able and willing to purchase upon the terms which defendant had authorized. It is argued that defendant could not avail of this defense, because he based his refusal to sell solely upon the ground that he had previously revoked the authority, and therefore it was error to give these instructions. We are of opinion that the fact that defendant refused to sell, because he had previously withdrawn the authority to sell, did not relieve plaintiffs from the necessity of proving that they had found a party ready, willing and able to purchase upon the very terms prescribed by the owner. But if this were not so, and if the instructions were therefore incorrect, yet as a verdict for plaintiffs could not in any event be sustained, for the reason first above stated, such incorrect instructions would not authorize a reversal of the judgment. The judgment is, therefore, affirmed.

Affirmed.

A. Franklin Bennett v. Louisa H. Palmer.

Gen. No. 4,570.

1. **PERFORMANCE**—*when party cannot complain of failure to make.* A party cannot complain of the failure of the other party to the contract to make performance thereof where the party seeking to complain has prevented the other party from making performance.

2. **PAROL EVIDENCE**—*when competent to explain written instrument.* Where a written instrument contains a reference to a subject-matter which can only be identified by extraneous evidence, parol evidence is competent to make such identification certain.

3. **INTEREST**—*right to, where contract contains no stipulation.* Where a contract provides for the payment of money in the future but does not provide for the payment of interest, no interest can be charged until demand, but after demand the right of interest accrues at the legal rate.

4. **STATUTE OF LIMITATIONS**—*when five-year provision has no application.* Where a contract providing for the payment of money is signed by the party obligated to pay the same, but not by the other party, the five-year limitation has no application, but the ten-year provision governs such contract, where it appears that the party to whom such money is due has fully performed so far as it was within his power to perform.

Action of assumpsit. Error to the Circuit Court of Boone county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed October 16, 1906.

WILLIAM L. PIERCE and W. C. KELLUM, for plaintiff in error.

R. K. WELSH, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This cause was before this court in *Palmer v. Bennett*, 96 Ill. App. 281, where a judgment for the plaintiff, A. Franklin Bennett, was reversed, and the cause was remanded for a new trial. The statement and

opinion then filed show the case as then presented. Just before a second trial was had plaintiff, by leave of court, supplied, *nunc pro tunc*, a lost order relating to the pleadings, which order it seems had never been entered of record and had been lost from the files. By this order a demurrer was sustained to defendant's special plea alleging fraud by plaintiff in securing the written contract from defendant involved in this suit, and also to defendant's special plea alleging a subsequent abandonment of the contract sued upon and the making of another and different contract between the parties. Said *nunc pro tunc* order further shows that plaintiff withdrew the first three counts of his declaration, and filed an additional count, and that the pleadings then stood as follows: the original declaration, except the first three counts; the additional count; a plea of the general issue verified; a plea of the five years' Statute of Limitations, and a plea of the Statute of Frauds, with oral replications considered as duly filed, and all issues thereon considered as duly joined. This order is not now in any way questioned, and it is therefore clear that much of the matter stated and discussed in our former opinion is not involved in the present record. At the second trial the signature of defendant to the contract, and the failure and refusal of defendant to deed the Roscoe farm to plaintiff, and the offer of plaintiff to give defendant a mortgage thereon as required by the contract, were proved by plaintiff, together with other facts not necessary to be now stated; so that the proof made a *prima facie* case for plaintiff, unless the contract was void under the Statute of Frauds, or unless the proof did not meet the plea of the Statute of Limitations. When plaintiff offered the contract in evidence defendant objected thereto, that it was not a sufficient memorandum under the Statute of Frauds, and that it was not a sufficient contract to take it out of the five years' Statute of Limitations. These objections

were sustained, and plaintiff excepted. At the close of plaintiff's proofs, the court excluded all the evidence and directed a verdict for defendant, to which action plaintiff excepted. Motions by plaintiff for a new trial and in arrest of judgment were denied, and defendant had judgment. Plaintiff has sued out this writ of error to bring the record before this court for review.

The instrument in question is given as follows in the bill of exceptions now before us:

"A. F. Bennett and I have made a contract. I take hie his farm at \$10,000. He takes up his note a moun-tain to 6843.67 and he takes our Roscoe farm at 6000 I give him a Warentte Deed and he gives me a mortgag on the farm 2843.67 the difference in the debt.

Belvidere Apr. 2nd 1890.

LOUISA H. PALMER."

It will be seen that this instrument is dated April 2, 1890. The record of a deed from plaintiff and his wife to defendant conveying to her plaintiff's farm in Boone county for an expressed consideration of \$10,000, was introduced in evidence. It was dated and recorded on April 1, 1890, and plaintiff testified that he delivered possession of the land to her on the same day. Defendant is a relative of plaintiff's wife. She lived in Chicago, and plaintiff lived in Belvidere, the county seat of Boone county. Defendant came to plaintiff's house on April 1st and left it for Rockford on the morning of April 2nd, saying she had to go there to get a description of the Roscoe farm, as she did not have her deed with her. The instrument sued on may not have been written and signed till the morning of April 2nd, but it is clear that the deed and this contract were all parts of one transaction. The words, "his farm" in the contract, therefore referred to the farm described in the deed. Plaintiff's proof, with matter brought out on cross-examination, shows that the words "his note a mountain to 6843.67" referred to a note which plaintiff owed to defendant and which was

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secured by a mortgage on the farm plaintiff so sold and conveyed to defendant. By subtracting \$6,843.67 from \$10,000, we find that the transfer of the farm to defendant canceled the debt he owed her, and left her owing him \$3,156.33. This amount is ascertained by a mere computation, and is just as truly expressed in the writing as it would have been if it had been stated in so many words. This contract means that defendant thereby promised to pay plaintiff \$10,000 for the farm he had so deeded and delivered to her, and that she was to surrender plaintiff's note and thereby extinguish \$6,843.67 of that debt. The rest of the debt she has never paid. By the writing she agreed to convey to him her Roscoe farm at the price of \$6,000 in extinguishment of her debt to him. By subtracting the debt she owed him for his farm, \$3,156.33, from the agreed price of her farm, \$6,000, we find that if she had made that conveyance as she agreed he would then have been made her debtor in the sum of \$2,843.67, and the writing shows that the parties correctly figured it, and that upon her conveying the Roscoe farm to plaintiff he was to give her a mortgage for that difference of \$2,843.67. But on the return of the defendant from Rockford to plaintiff's home in Belvidere, from two to four days later, she told plaintiff that she would have been unable to borrow on the farm he had conveyed to her as large a sum as she needed for the purchase of a home in Chicago, and so she had mortgaged both farms, and had mortgaged the Roscoe farm for \$3,000 and that she could not deed it to him. She afterwards sold and conveyed both farms to other parties. Plaintiff proved he had always been ready, willing and able to give her a mortgage upon the Roscoe farm for the sum named, upon her giving him power to do so by conveying the title to him.

It is manifest that under the pleadings and proofs now before us, this judgment does plaintiff a great injustice, and that it ought not to stand, unless the rules

of law compel such a conclusion. Defendant's counsel asserts that facts exist which would put a different complexion upon the case, and he states them in his brief. We are only concerned with the record now before us, and no such facts are pleaded or proved. Upon this record the facts are that plaintiff, now seventy years of age, conveyed his farm to defendant over sixteen years ago, and she promised in writing to pay him a certain sum therefor, and that a very large balance still remains unpaid, and technical rules of law are the only defenses interposed. Plaintiff did not sign the contract. But he did sign and deliver the contemporaneous deed and delivered possession of the land therein conveyed, and he thereby fully performed all that he could then perform. He offered to execute a mortgage on the Roscoe farm, but he could not do so till defendant clothed him with the title. This she failed to do, and put it out of her power to do, both by mortgaging it and by conveying it to another. By her own failure and by her own act she prevented further performance by plaintiff. She should not be heard to complain that plaintiff did not perform or did not in writing bind himself to perform that which she prevented him from performing. We are disposed to hold, that as defendant prevented the performance of that part of the contract relating to the Roscoe farm and immediately after this contract was made put it out of her power to perform, we may properly treat that part of the contract as unimportant in this case, even if it is as defective as defendant now claims. It will be remembered that defendant is not seeking to enforce this contract against plaintiff, who did not sign it, but that plaintiff, who performed all that he could perform, and all that defendant would permit him to perform, is seeking to enforce it against defendant, who did sign it and who received the agreed consideration for signing it. Plaintiff is only asking that she pay what she agreed in writing to pay for the

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farm which he conveyed to her. If we disregard the part of the contract relating to the Roscoe farm, then plaintiff is entitled to recover the unpaid portion of the price defendant agreed to pay him for his farm.

But is the rest of the contract void under the Statute of Frauds? The words, "our Roscoe farm" were fully explained by showing that defendant had a farm near the village of Roscoe in Winnebago county, which she called the Roscoe farm, and which plaintiff's daughter then occupied as defendant's tenant, and that defendant had no other farm which she designated by that name. Such proof was competent. *Cossitt v. Hobbs*, 56 Ill. 231. Plaintiff did not sign, and therefore did not bind himself in writing to give defendant a mortgage on the Roscoe farm for \$2,843.67, but he offered to do so, and his offer was not accepted by defendant, but she put it out of his power to perform that provision. She is not seeking to compel him to give such a mortgage, and as she has conveyed the farm to another, she is not in a position to ask him to perform or to accept such a mortgage from him.

It is argued that in the contract there is no time specified when such mortgage debt should mature, and no rate of interest stated, and that the terms of the mortgage are not set forth, and that therefore the contract is incomplete and must have rested partly in parol. Let us suppose that nothing had been said in the contract about a mortgage, but that the last part of the contract had read "and he gives me 2843.67 the difference in the debt." Payment would then have been due on demand. So we conclude this contract called for a mortgage on the Roscoe farm securing payment of \$2,843.67 to defendant on demand. No rate of interest having been specified, that sum would bear no interest till demand, and after demand it would bear the statutory rate without reference thereto in the mortgage. As the contract did not require special provisions in the mortgage, a simple instru-

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ment conveying the land as security for that part of the purchase money would have satisfied the contract. We, therefore, hold that the contract is not void under the Statute of Frauds.

As we hold this to be a suit against defendant upon a written contract signed by her, to recover the unpaid portion of the price she therein agreed to pay for the plaintiff's farm, which he conveyed to her, the five years' Statute of Limitations has no application, as held in our former opinion.

We recede from our statement in our former opinion that the damages sought to be recovered were unliquidated and therefore plaintiff was not entitled to interest. A mere computation determines the amount of the damages, and therefore they were liquidated. From the date when plaintiff demanded performance and defendant refused to perform, after having put it out of her power to perform, she became liable to interest at the statutory rate.

The judgment is, therefore, reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

**Sterling, Dixon & Eastern Electric Railway Company
v. James Wise.**

Gen. No. 4,654.

1. APPELLATE COURT—*power of, to review verdict upon facts.* It is not only within the power of the Appellate Court, but it is its duty to examine the evidence adduced and determine therefrom whether a case has been made entitling the plaintiff to recover.

2. PASSENGER—*what contributory negligence.* Held, from the evidence in this case, that the plaintiff in taking a position upon the platform of the car upon which he was riding as a passenger, unnecessarily placed himself in a position of danger which precluded his recovery under the evidence offered.

Sterling, Dixon & Eastern Ry. Co. v. Wise.

Action on the case for injury caused by alleged wrongful act. Appeal from the Circuit Court of Lee county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1906. Reversed. Opinion filed October 16, 1906.

A. C. BRADWELL, for appellant.

JAMES W. WATTS and JOHN P. DEVINE, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The Sterling, Dixon & Eastern Electric Railway Company operates an interurban railway from Sterling to Dixon by electrical power. It passes by a milk factory, called also Swissville, near Dixon. There are two roads running north and south from the public highway to the factory, and there is a space of eighty-five feet between the roads. The railway crosses these roads near the milk factory, and has a curve of about seven inches in sixty-six feet which ends before the track reaches the east road in going from west to east. On June 25, 1905, James Wise was a passenger on an east-bound car from a point about three miles west of the factory. At the factory he got down on the step on the north or left hand side of the car, and while the car was in motion he either lost his balance or fell or stepped or jumped off. He struck his head upon some object and was injured. He brought this suit against the railway company to recover damages for said injuries.

The first count of his declaration charged that plaintiff was a passenger to be carried to Swissville, and that on the arrival of the car at Swissville and while plaintiff was preparing to alight therefrom, defendant negligently failed to stop the car, but continued to run the same at a high rate of speed, and thereby plaintiff was thrown with great force to the ground and was thereby hurt. The second count alleged that defendant negligently omitted to stop the

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car, but ran it at high speed beyond Swissville, and thereby plaintiff was thrown with great force to the ground, and was thereby hurt. Each count averred plaintiff was exercising due care. Defendant pleaded the general issue. Plaintiff had a verdict for \$237 and judgment thereon, and defendant appeals.

Plaintiff's proof tended to show that when he paid his fare he told the conductor that he wished to get off at Swissville, and that another passenger did the same; that as the car approached that place plaintiff arose from his seat in the car, passed to the rear platform, and got down upon the step on the north side of the car, and was ready to alight; that the west road was the proper place at which to stop the car; that the car did not stop at either road, but continued on at a speed of ten or fifteen miles an hour; that the motion of the car in passing from the curve to the straight line threw plaintiff off the car, and at that time he had hold of the front handle with his right hand, the proper position to assume in alighting from that side. Defendant's proof tended to show that plaintiff did not notify the conductor that he wished to get off at Swissville, but that the conductor intended to stop there, and thought it best to stop at the east side of the east road, and gave the motorman a signal to stop when the car had almost reached the west road; that as the car crossed the west road it was running two or three miles per hour; that plaintiff stepped down on the north side, took hold of the rear handle with his left hand, and as the car had not yet stopped when it crossed the east road plaintiff stepped off, and as he had hold of the wrong handle the motion of the car twisted him around with his back toward the east, and he fell and struck his head against the step of the car, inflicting a wound upon his head. The fact that he was wounded on the back of the head tends to show he had hold of the rear handle with his left hand when he got off the car. It will be seen, therefore, that there

is a conflict in the proofs as to the speed of the car, and as to whether plaintiff stepped off or lost his balance and fell off, and as to whether at the time he left the car he had hold of the front handle with his right hand or of the rear handle with his left hand. He fell at a point several feet east of the east road, and the car went some distance further before it stopped, but the distance the car ran was disputed. Plaintiff fell about sixty-five feet east of the east end of the curve, so that there was reason for doubting whether the motion of the car in leaving the curve could have thrown plaintiff off the car. There was a special verdict that plaintiff exercised ordinary care in standing on the step, that he did not step off the car, that he was thrown from the car, that the car was being negligently operated at the time of the injury, and that such negligent operation caused the injury to plaintiff. In this conflict of the evidence plaintiff is entitled to the presumption that the jury found that the evidence introduced by plaintiff was true. Plaintiff insists that in such a case this court has no right to disturb the verdict. On the contrary, as has often been held by the Supreme Court and by this court, the law has cast upon us the duty of determining whether the proof made a case entitling plaintiff to recover. *Chicago City Railway Co. v. Mead*, 206 Ill. 174; *Love v. McElroy*, 118 Ill. App. 412.

We shall assume that the proof warranted the jury in finding that plaintiff requested the conductor to let him off at Swissville, that that was a place at which defendant was bound to stop to let off a passenger on request, and that the car ran by both roads. This was a violation of defendant's duty. The proof does not show that defendant was negligent in any other respect. This was not in a city or village, but in the country. Defendant had a right to run at a speed of ten or fifteen miles per hour. Defendant was not bound to lay its railway in an air line from Sterling to

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Dixon. If it did not do so, it must have curves. This was a very slight curve, and was made necessary by the location of its road. The declaration did not charge defendant with negligence in locating its line nor in locating a curve at that place. We are not advised of any statute or rule of law requiring a railway to reduce its speed when running upon a curve. The declaration does not charge negligence in traveling over a curve at an improper speed. The only negligence proven was that defendant failed to stop at Swissville, as requested by plaintiff. If plaintiff was injured by defendant's act in carrying him by that place, he may have a right of action for a breach of the contract to carry him to and leave him at Swissville. But this is not such an action. Were the jury warranted in finding that defendant's act in carrying him by the appointed place caused this injury? If plaintiff saw fit to go upon the step of the car before the car stopped, it was his duty to have such a hold upon the handles that he would not fall off. The failure to stop did not and could not throw him off the car. There is necessarily some motion in a car running ten or fifteen miles per hour. Defendant did not invite its passengers to stand upon the steps of its car while it was running at full speed. If plaintiff's proofs be taken as true, then the plain fact is that plaintiff unnecessarily placed himself in a position of danger while the car was running ten or fifteen miles per hour, and did not take such a hold upon the handle bars as enabled him to retain his place upon the car, and fell because of his own acts and neglect, and not because the car did not stop. A passenger upon a car traveling at a high rate of speed may not place himself where he will fall unless the car stops, and when he falls and is hurt, avoid responsibility for his own injury by saying it was the duty of the conductor to stop the car and if it had stopped he would not have been hurt. According to plaintiff's proofs he knew of

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the rapid speed of the car and knew it was not stopping. When under those circumstances he descended upon the step and failed to take such a hold as would protect him from falling, the injury is chargeable to his own lack of due care. The judgment is, therefore, reversed.

Reversed with finding of facts.

Finding of facts, to be incorporated in the judgment:

We find that defendant was not guilty of any negligence which caused or contributed to plaintiff's injury, and that plaintiff's injury was caused by his own negligence and lack of due care for his own safety..

Western Tube Company v. Frederick W. Pederson.

Gen. No. 4,691.

1. **EXCEPTIONS**—*how must be argued upon appeal.* The Appellate Court is not bound to consider exceptions where the brief filed in support thereof merely states that such exceptions are well taken; in order to obtain review, the exceptions relied upon should be argued in the brief.

2. **NEGLIGENCE**—*when instructions upon, properly modified.* Instructions which tell the jury that the plaintiff is only entitled to recover when he has shown that his injury was caused "wholly" by the defendant's neglect, are properly modified by striking therefrom the word "wholly."

Action in case for personal injuries. Appeal from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

CHARLES K. LADD, for appellant.

ANDERSON & ANDREWS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Pederson, the appellee, was in the employ of Western Tube Company, the appellant, as a "rougner" upon its rolls in its mills at Kewanee, and on February 18, 1903, he was assisting on changing the rolls. A steel chisel bar struck him a severe blow upon his lower jaw and broke it, and he was severely and permanently injured. He sued appellant therefor, and recovered a verdict and a judgment for \$1,850 from which this appeal is prosecuted.

At the place in question appellant's work required three rolls, one at the bottom, another just above that, and a third on top. When these rolls were in operation, sheets of iron were passed between them, and thereby reduced to the thinness appellant required. The rolls were frequently removed and other rolls of other dimensions put in their places. The roll which was being put in place when appellee was injured weighed about forty-five hundred pounds. The body of the roll was about eighteen inches in diameter. At each end of the body was a journal about eighteen inches long and ten inches in diameter. The rolls stood east and west. At each end of the rolls was an iron frame or arch, standing north and south, called a housing. The legs of a housing were parallel and perpendicular, and about eight feet high, and about twenty-seven inches apart on the inside. Pieces of iron were cast in this opening, at right angles to the rolls. A carriage or bearing rested upon each of these. In each carriage there was an indenture or box, in the shape of a half circle, lined with brass, in which a journal or roll rested. When a roll had been placed in its proper position for use, another half circle was placed above the journal, thus forming a complete circle of brass around the journal in which it revolved when the rolls were in operation. When a roll was to be put in position it was carried to its place by a crane

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to which a chain was attached and wrapped around the roll. The housings were not far enough apart to permit the roll to be lowered directly into its place. Hence it was necessary to raise one end of the roll and lower the other, and to insert the journal at one end into its place, and then lower the other. There were at the east housing, at least, set screws in a pit back of the housing, by which, when a roll was in place the carriage was moved close to the body of the roll, so that the roll when in operation would have only a very slight play of perhaps a quarter of an inch. By the aid of these set screws the east carriage could be moved west two or three inches, and conversely if these screws were not set, a sufficient force applied to the west side of that carriage would cause it to slide two or three inches east of the position it occupied when the rolls were in operation. The east end of the roll in question had been the lower, and the journal had partly, but not wholly, entered its proper place. The west end of the rolls was several inches higher, and had become lodged upon the edge of the west carriage. Appellee and others were directed to dislodge it by use of crowbars and a chisel bar, and they tried to do so and failed, and appellee's chisel bar and one or two crowbars had been caught and bound between the shoulder of the roll and some part of the housing, and they could not be moved or taken out. The foreman then ordered the chain about the roll to be slackened by the men operating the crane, and that was done, and the entire weight of the roll was left resting upon its two ends. It remained some five minutes in this tilted position. The foreman then ordered appellee and another workman to change the position of the chain upon the roll so as to lift the east end, in order to try thereby to force the west journal off the edge of the carriage and into its box. The chain was so changed. Appellee's proof is to the effect that after that change had been made, and before the men in charge of the crane had again tightened the chain, the

foreman ordered appellee to take hold of his bar, so bound and held by the weight of the roll, and that appellee stepped towards his bar for the purpose of obeying the order; that the foreman at that instant, and while the crane was still slack and not holding the roll, went into the pit east of the east housing with the wrenches with which the set screws were moved, and released the set screws, or moved them east, and thereby permitted the weight of the roll to force that carriage two or three inches east; and that this movement released the position of the west journal on the edge of the west carriage, and the roll fell, and thereby appellee's bar was flung with great force against his jaw. Appellee's proof tended to show that the chain around the center of the roll should first have been taut; and that, if that had been done, the weight of the roll would not have forced the east carriage to the east and the west end of the roll would not have fallen and thrown appellee's bar, but that the west end of the roll would have been lowered gradually. Appellee's proof also tended to show that the set screws should not have been released while the chain was loose, and also that plaintiff should not have been ordered to take hold of his bar while the chain was loose, and when the set screws were immediately to be released. The foreman testified for appellant that he did not release the set screws at that time, but that he did so before the former roll was taken out, and then left them released while the roll was being put in. Appellee contends that if so, then it was negligence for the foreman to order appellee to take hold of his bar, so pinched and held by the weight of the roll, when the foreman knew that the set screws had been released and that because thereof and because the chain was loose the east carriage might move east and the west roll fall at any time from its position on the edge of the carriage, and that the effect of such movement would be likely to expel appellee's bar in some direction with great force. Appellant's proof tended to show that the in-

jury to appellee was due to an unforeseen and unavoidable accident; that appellee had been in the employ of appellant upon these rolls for many years, and knew the dangers as well as the foreman knew them; that the roll was put in place in the usual manner; that the situation caused by the west end lodging upon the edge of its carriage was not unusual; that nothing unusual was done; that the foreman did not order appellee to take hold of this bar just before he was hurt; and generally that appellant and its foreman were not guilty of the negligence charged.

The several counts of the amended declaration appropriately described the rolls and the housings and the general situation, and charged that the foreman, with knowledge of the entire situation, negligently failed to direct the men at the crane to keep the chain tight, so as to control the roll, by means of which the roll fell and appellee was injured; that the foreman negligently moved the set screws away from the carriage, without warning to appellee, and that appellee's injury resulted therefrom; and that, knowing that the set screws had been moved, the foreman negligently ordered appellee to take hold of his bar, and that by means of the negligent moving of said set screws without warning to appellee he was injured while obeying said order. We have carefully considered the evidence, and find that there is a conflict in the proof upon some material points. There is positive testimony introduced by plaintiff that the chain was loose and did not support the roll; that just as the carriage moved east, the foreman came out of the pit with the wrenches for moving the set screws in his hands, which had a tendency to prove that the carriage moved at that instant, because the set screws had just been released; that the foreman, just before going into the pit, ordered appellee to take hold of his bar; and this proof, together with the other proof describ-

ing the situation, and with proof that appellee did not know the set screws had been or were to be moved, and with proof of what the foreman knew, justified a finding for appellee. In so far as this proof was disputed by proof introduced by appellant, a question of fact was presented for the jury to decide, and there was no condition of proof which would authorize us to interfere with their conclusion.

Appellant states in its brief that various specified pages of the record show exceptions by it to rulings of the court upon the admission and exclusion of testimony, and that those exceptions are well taken. This is not an argument of such exceptions, and does not require us to hunt up the rulings upon these pages and to study them to see if we can discover some reason for holding them erroneous. So far as these exceptions are elsewhere slightly argued, in appellant's brief, we find no serious and prejudicial error in the rulings.

The fifth and sixth instructions requested by appellant would have advised the jury that to entitle appellee to recover, the proof must show that appellee's injury was caused wholly by appellant's neglect. The court gave these instructions after striking out the word "wholly." This action was correct. If appellant's negligence was the efficient cause of the injury, it would be no defense that inevitable accident or inanimate things contributed to the injury. *City of Joliet v. Shufeldt*, 144 Ill. 403; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Com. El. Co. v. Rose*, 214 Ill. 545; *Christy v. Elliott*, 216 Ill. 31. So far as the word "wholly" in these instructions would have applied to contributory negligence by appellee, that was fully covered by the eighth and tenth instructions given for appellant. Appellant concedes that its sixteenth instruction was properly refused. We find no reversible error in the record.

The judgment is, therefore, affirmed.

Affirmed.

Harley v. A., E. & C. Ry. Co.

Maria B. Harley v. Aurora, Elgin & Chicago Railway Company.**Gen. No. 4,636.**

1. **INJURY**—*when instruction telling jury to disregard the plaintiff's, is improper.* An instruction which tells the jury that they should not consider the fact that the plaintiff was injured in determining whether the plaintiff is entitled to recover and whether the defendant is negligent, is improperly given in an action by a passenger against a carrier, inasmuch as a *prima facie* case is made as between a passenger and carrier by proof that the plaintiff was a passenger for hire and that an accident happened whereby the plaintiff was injured.

2. **CONDUCTOR**—*when not entitled to assume that all passengers have alighted.* Held, under the facts of this case, that the conductor of the train in question was not entitled to assume that all the passengers intending to alight at the station at which the train was standing, had, in fact, alighted.

3. **PASSENGER AND CARRIER**—*when regulations of latter, do not bind former.* Regulations of a carrier as to which platform shall be used for the purpose of alighting, which are in the form of instructions to its trainmen, are not binding upon a passenger, if not known to him.

4. **NEGLIGENCE**—*when instruction upon, erroneous.* Instructions upon the subject of negligence which in effect tell the jury that proof of certain facts would establish that the plaintiff was negligent or that the defendant was not negligent, invade the province of the jury and are improper; such instructions should leave it to the jury to decide the question of negligence from all the evidence in the cause.

Action in case for personal injuries. Appeal from the City Court of Aurora; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the April term, 1906. Reversed and remanded. Opinion filed October 16, 1906.

ELMER & COHEN, E. C. WOOD and SEARS & SMITH,
for appellant.

HOPKINS, PEFFERS & HOPKINS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion
of the court.

The Aurora, Elgin & Chicago Railway Company

operates an interurban railway propelled by electrical power. Mrs. Maria R. Harley was a passenger for hire upon said railway from Wheaton to Aurora. The train stopped at New York street in Aurora to let off passengers. While Mrs. Harley was alighting from the train there it started and she was thrown to the ground or fell or stepped off while it was in motion, and she was thereby injured. She brought this suit against the railway company to recover damages for said injuries. Each count of the declaration as amended set up that the relation of carrier and passenger for hire existed between the parties, and that plaintiff was exercising due care for her own safety, and that she was injured by her fall. The first count averred that while plaintiff was in the act of alighting from defendant's car at said street defendant negligently started the car suddenly and without warning, before plaintiff had a reasonable time to alight therefrom, and she was thereby thrown upon the street. The second count charged that defendant so negligently started the car while plaintiff was in the act of alighting therefrom, at defendant's invitation, that thereby she was jostled and caused to fall. Defendant filed the general issue. There was a jury trial and a verdict for defendant. A motion by plaintiff for a new trial was denied, defendant had judgment, and plaintiff appeals.

The train was made up of two vestibuled passenger cars. Defendant instructed its employes to keep the vestibules closed at the front end of the front car and at the rear end of the rear car, and to receive and discharge passengers at the vestibules between the two cars. Plaintiff and her relatives, Mrs. Beebe and Miss Harley, were riding in the rear end of the rear car. At New York street the train stopped and the rear vestibule was open. Who opened it does not appear, and the proof leaves it uncertain how long it had been open. Plaintiff introduced positive proof that at each of the

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last two preceding stops a passenger had alighted at the rear of the train. Defendant introduced proof of circumstances tending to show that no passenger alighted from the rear of the train at those places. Plaintiff did not know when or by whom the rear vestibule was opened, and had nothing to do with opening it. But it was proved without dispute that at New York street that vestibule was open and in a condition which permitted passengers to alight just as freely and easily as at the center of the train, and was in the same condition it would have been in if defendant had expressly invited passengers to alight there or had planned that they should do so. Plaintiff knew nothing of the regulations or instructions by defendant which required the train men to have the passengers alight at the center of the train. At New York street several persons went to the rear vestibule and alighted there. The proof does not show definitely how many left the car by the rear door and steps, but plaintiff was preceded by at least a lady and a gentleman, not of her party, and by Mrs. Beebe, and was followed by Miss Harley, so that at least five persons were alighting from the rear of that car, and when the car started three had just alighted, another was in the act of stepping off, and another passenger just back of her intended to leave the car there. Each car had a conductor. When the train stopped at New York street, the conductor of the front car stepped off the rear end of that car, assisted the passengers from it to alight and then stepped back upon the platform of his car, ready to signal the motorman to start the train. The conductor of the rear car testified that after the train left its last preceding stop he went inside the car, announced New York street and said in a loud voice, "This way out, please," and went out of the front door. Plaintiff testified she did not hear him, and no passenger testified to hearing him. When the train stopped at New York street the rear

conductor got off the front end of his car, helped off eight or ten passengers, stepped back and looked into the window to see if any more passengers were coming, gave the signal to the conductor of the front car to proceed and got upon the rear car, the front conductor gave the signal to the motorman and the train started and plaintiff fell. The length of the stop was from twenty to thirty seconds. Up to this time neither conductor had looked towards the rear of the rear car. After plaintiff fell she screamed, and the rear conductor then looked back and saw her and stopped the car. Defendant introduced proof that Mrs. Beebe and Miss Harley made statements soon after the accident implying that plaintiff stepped off after the car started. There was contradictory proof as to whether the car started with a jerk, and as to the distance it ran before it stopped again, and as to the extent of plaintiff's injuries.

The court, at defendant's request, instructed the jury that they should not consider the fact that plaintiff was injured in determining whether plaintiff was entitled to recover and whether defendant was negligent. Such a rule is not applicable to an action by a passenger against a carrier for injuries received while that relation existed. Proof that defendant was a common carrier of passengers, that plaintiff was a passenger for hire with defendant, and that an accident happened whereby plaintiff was injured while a passenger, where, as here, the proof tends to show that the accident was due to the negligent conduct of servants of the carrier, makes a *prima facie* case and casts upon the carrier the burden of explaining. The fact that plaintiff was injured while a passenger is a material part of the proof necessary to establish a right to recover. *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318; *Chicago City Railway Co. v. Rood*, 163 Ill. 477; *Chicago Union Traction Co. v. Mee*, 218 Ill. 9. It was error to direct the jury to exclude that material ele-

ment of proof from their consideration in determining whether plaintiff was entitled to recover.

The court, at defendant's request, instructed the jury that if, after the train stopped, a reasonable time had elapsed for plaintiff to alight before she was injured, then the relation of common carrier had ceased, and defendant could not be held liable for the injury as a common carrier of passengers; and also, that if a reasonable time for plaintiff to alight had elapsed prior to the accident, and plaintiff had failed to alight, she could not recover; and also, that after a train had stopped a reasonable time to enable passengers to alight in safety, the conductor is not required to go through the cars and make inquiry of the passengers to ascertain whether all have alighted who intend to do so, and that if the train had stopped a reasonable length of time to enable plaintiff to alight in safety, then the conductor had a right to presume that all who intended to alight had done so, and had a right to start again, unless he knew plaintiff was in the act of alighting. Circumstances can be imagined to which some of these propositions would be properly applied. But there was no proof here that plaintiff delayed at all in getting off the car. Her movements were necessarily controlled by those ahead of her, and there is nothing to show that they were guilty of any delay. Here was a rear door, an open vestibule, and steps in place and apparently inviting the passengers to alight there. At least three passengers had just stepped down, plaintiff was in the act of alighting, and another passenger was awaiting her turn to alight. All this was within fifty feet of the two conductors, on the same side of the car that they were and in plain sight if they looked. Under such circumstances it is not true, as a matter of law, that a conductor is at liberty to assume that all have alighted who intend to do so, and to start his train.

The court at the request of defendant instructed the

jury that it is the duty of a passenger to comply with the usual, reasonable and known regulations of the carrier with reference to a safe exit from the cars; that if the evidence showed that it was a regulation of defendant that passengers should alight from the front platform, and that plaintiff disregarded such direction and alighted from the rear platform, and and thereby contributed to the accident and injury, she could not recover; and also in another instruction, that it is the duty of passengers to obey the reasonable directions of those in charge of the train, and if the jury found from the evidence that the conductor in charge of this car directed the passengers to alight from the front platform, and that plaintiff disregarded such direction and alighted from the rear platform, and thereby contributed to the accident and the injury, she could not recover. Plaintiff was a visitor at Aurora, and did not live in the counties where this railroad ran. There is no proof that she ever rode upon one of defendant's cars before the day she was injured. There is no proof that she had any knowledge or notice of the regulations which defendant established. The regulations proven were merely oral instructions to its trainmen. Although plaintiff testified she did not hear the conductor make the announcement, and no one testified to hearing him, yet as the conductor testified he made the announcement inside the car in a loud voice, defendant had a right to submit to the jury the question whether plaintiff heard it. But if she heard it, all she heard was, "This way out, please." That did not inform her that the defendant had established regulations as to the end of the car from which passengers should alight. As defendant had introduced proof that it had instructed its employes to keep the vestibule at the rear of this car closed and to discharge passengers only at the vestibules between the cars, and as there was no proof

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that this instruction to its employes was known to plaintiff, the court should not have charged the jury that if plaintiff knew of that regulation and disregarded it and thereby contributed to her injury, she could not recover. That instruction tended to lead the jury to believe that the court considered that there was proof tending to show that plaintiff knew of that regulation. It was calculated to mislead and confuse the jury. The court also should not have assumed in its charge that the words of the conductor were a direction to the passengers rather than a mere request. If the question whether it was plaintiff's duty to leave the car by the front door was to be submitted to the jury, it should not have been submitted merely upon the utterance by the conductor of the words above quoted in the hearing of plaintiff, but the jury should have been left to determine that question from all the circumstances surrounding plaintiff at the time. These instructions ignore the proof that the rear car was partitioned, and the front end was a smoking room, and that the rear vestibule was open and the platform and steps in readiness for the use of passengers, and that other passengers were alighting there. It may be the jury would have found it consistent with ordinary care that, when these ladies saw a lady and gentleman alighting at the rear of the car, they should follow rather than pass through the smoker. So far as the proof shows, plaintiff had no reason to suppose that the rear vestibule was not always kept open, nor could she know it was not kept open for the special accommodation of passengers in the rear of the car and far from the front. In our opinion it is not true, as a matter of law, that under such circumstances, if plaintiff heard the conductor say, "This way out, please," and saw him go out at the front door, but she left the car through an open vestibule at the rear, and went down steps defendant had provided for passengers, following other passengers

who were leaving the car in that way, she thereby ceased to be a passenger before she had left the car, and lost her right to the care and protection defendant owed to its passengers, and thereby barred herself from recovering for injuries caused by defendant's negligence while she was in the act of alighting. It is not necessary to decide what defendant should have done if it wished its passengers to leave the rear car only at the front end. It is sufficient to say that we hold that plaintiff was not deprived of the rights of a passenger because she left by the rear vestibule, under all the circumstances disclosed by the proof, and therefore these instructions should not have been given.

Most of the instructions herein referred to also invaded the province of the jury, and in effect told them that proof of certain facts would establish that plaintiff was negligent or that defendant was not negligent, whereas the jury should have been left to decide the question of negligence under proper instructions as to the legal rights and duties of the parties. *C. & A. R. R. Co. v. Kelly*, 182 Ill. 267. Other instructions given at defendant's request are imperfect, but we think the suggestions already made will be a sufficient guide for another trial. Plaintiff's instruction defining the duties of common carriers of passengers should have contained the qualification, "consistently with the practical operation of the road."

Plaintiff should have been allowed to prove that she left the hospital under the direction of a competent physician, as it might otherwise be argued that she was negligent in leaving when she did, and that she thereby brought on some of her subsequent ills.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Harrigan v. County of Peoria.

Michael Harrigan v. County of Peoria.

Gen. No. 4,687.

1. *SUIT—how authority to institute, should be questioned.* The proper method of questioning the authority to institute and prosecute a suit is not by a motion to dismiss, but by obtaining a rule requiring a showing of authority.

2. *SUIT—when authority to institute, cannot be questioned.* The authority to institute and prosecute a suit cannot be questioned after the same has been heard upon the merits.

3. *SUIT—what supplies absence of showing of authority to institute.* Where it appears that the plaintiff in a suit has in open court performed an act ratifying the institution and prosecution of the suit, any absence of a showing of authority so to institute and prosecute the same is supplied.

4. *REPLICATION—when filing of, not necessary.* The filing of a replication is waived by submitting the cause for hearing upon bill, answer and exhibits; and where a replication is so waived, none need be filed.

Bill in chancery. Appeal from the Circuit Court of Peoria county; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the April term, 1906. Affirmed. Opinion filed October 16, 1906.

CHARLES A. KIMMEL, for appellant.

ROBERT SCHOLES, State's Attorney, and JACK, IRWIN, JACK & DANFORTH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The merits of this case were determined in favor of the county in *Harrigan v. County of Peoria*, 106 Ill. App. 218, to which we here refer for a statement of the pleadings and proofs. While the remanding order seems to have been general, the opinion of this court shows that the only purpose of remanding the cause was to have the court below hear proofs and fix in its decree the amount which the county should pay to redeem from the tax sale to Harrigan, instead of leav-

ing the county clerk to ascertain the amount, as was done in the former decree. After the cause was reinstated in the court below, Harrigan moved to dismiss the suit on the ground that the county board had not authorized it. This motion was heard and denied. Complainant then filed a replication, and on its motion the cause was referred to the master to take and report proofs, and to report the amount Harrigan had paid on account of said original tax sale certificate, with the subsequent costs and taxes paid by him on account of said tax sale, and the amount complainant should pay Harrigan if the tax sale should be set aside as prayed in the bill. Thereafter defendants moved to strike the replication from the files, and that motion was denied. The master gave notice to the parties, heard and reported the proofs, and reported the date and amount of the original tax purchased by Harrigan, that there was no proof that he had paid any subsequent costs or taxes, and that if the tax sale should be set aside complainant should refund to Harrigan the sum so reported and legal interest thereon from the date of the sale. Defendants filed objections to said report, all based upon the proposition that the cause had been heard upon bill, answer and exhibits, and thereby the answer had been taken as true, and therefore complainant had no right to offer testimony before the master and the master had no right to hear or consider such testimony. The master overruled these objections. Defendants then filed exceptions before the court, and they were overruled, and a decree was entered substantially like the former decree, except that it fixed the amount the county should pay Harrigan as a condition to setting aside the tax sale; and the county in open court tendered Harrigan such sum and he refused to accept it, and the court then ordered the money paid to the clerk of the court for Harrigan's use. Harrigan now appeals from that decree.

In support of his motion to dismiss the suit Harri-

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gan filed his own affidavit that he had searched the record of the county board from the first Monday of December, 1900, to and including July 22, 1901, the date when the bill was filed, and was unable to find any record authorizing the state's attorney and the other solicitors who signed the original bill in this cause to use the name of the complainant in the institution of this suit, or to act in any manner for complainant. There are several reasons why the court did not err in refusing to dismiss the suit: (a) The proper motion in such a case would be to rule complainant's solicitors to show by what authority they began and prosecuted the suit, and not to move to dismiss the suit; (b) the motion came too late after the merits of the case had been determined in this court; (c) the affidavit did not show that such authority had not been given, for it might have been given before the first Monday of December, 1900, or there might have been some previous action authorizing the state's attorney or some attorney hired by the county to institute such a suit, or it might have been properly incident to the former proceedings set out in the bill of complaint whereby the real estate in question had been decreed to be escheated to the county; (d) the bill was sworn to by the chairman of the county board; Harrigan did not show that such chairman was not authorized to bring the suit; (e) in any event, by afterwards tendering to Harrigan in open court the sum fixed by the decree, the county ratified all that had been done in this cause in its behalf. This showed that the suit was prosecuted in its name with its knowledge. That was sufficient to bind the county. *Thompson v. Hemenway*, 218 Ill. 46.

Harrigan's contention that it was error to permit a replication to be filed and error to permit proof to be heard before the master, is based upon his claim that the case was originally heard upon bill, answer, and exhibits, and that the answer was thereby conceded to

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be true. This is a misapprehension. Certified copies of all the pleadings and proceedings by which the escheat was established and the title vested in the county, and a copy of Harrigan's affidavit for a tax deed, were attached to the bill of complaint, and those certified copies were the proofs by which the truth of the bill was to be established. When, therefore, the case was originally submitted upon bill, answer and exhibits, that was equivalent to submitting it upon bill, answer and proofs, and by such a submission the answer is not taken as true. No replication, therefore, need have been filed, and there was no error in refusing to strike it from the files. The reference was for Harrigan's benefit, so that if he had paid any subsequent taxes they should be repaid to him with interest. His answer stated the date of the sale and the amount he paid, and the interest could have been computed thereon without a reference. The court added to that amount \$1 which complainant admitted Harrigan was entitled to receive for advertising. The proof before the master showed that complainant's solicitor did not know of any subsequent taxes paid by Harrigan. Harrigan had the opportunity and did not prove any other payments, and did not claim in his objections to the master's report that the amount awarded him was insufficient. The amount awarded cannot now be questioned. We find no error in the record. The decree is, therefore, affirmed.

Affirmed.

Ella M. Savage et al. v. Evanston Savings & Loan Association et al.

Gen. No. 4,494.

1. HOMESTEAD LOAN ASSOCIATION—*when money offered for competitive bidding. Held, under the facts of this case, that a prima facie showing was made that the money loaned to the defendant*

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in the foreclosure proceeding was obtained by him after the same had been offered by the complainant association for competitive bidding, and that this *prima facie* showing is not rebutted by the fact that there was, in fact, no competition.

Foreclosure proceeding. Appeal from the Circuit Court of DuPage county; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the April term, 1905. Affirmed. Opinion filed October 16, 1906.

WILLIAM A. BITHER, for appellants.

A. J. PFLAUM and LUCIEN E. HARDING, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Henry G. Savage on January 10, 1896, borrowed from the Evanston Savings & Loan Association \$10,000, evidenced by his bond of that date, and secured by an assignment of shares of the stock of said association and by a mortgage upon real estate in DuPage county. Payments were made upon the loan. Savage conveyed the mortgaged property to one Parker, and afterwards Savage died, leaving a last will and testament, and his widow, Ella M. Savage, executrix thereof, and leaving said Ella M. Savage and their son, Frank M. Savage, as the only heirs at law. Said Ella M. and Frank M. Savage made other payments. Thereafter the association passed into the hands of liquidators, and this bill was filed to foreclose the mortgage for the amount remaining unpaid. The association was organized under the homestead loan association law of the State of Illinois. Section 8 of that act requires the money in the treasury to be offered for loan in open meeting, and that the person bidding the highest premium shall have the priority of loan; but that the association may by its by-laws dispense with the offering of its money for bids in open meeting, and, in lieu thereof, loan its money at a rate

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of interest and premium fixed by its by-laws, and either with or without premium, deciding the preference or priority of loans by the priority of applications for loans of its stockholders. The answer of Ella M. and Frank M. Savage averred that the association had no by-laws which dispensed with offering its money to loan at a competitive bidding, and that this money was not let at a competitive bidding, and that the rate of interest provided to be paid in the bond was greater than seven per cent. and usurious, and therefore all payments should be applied upon the principal, and that applying all such payments there was due upon said bond to complainants less than \$2,530.08, and that on or before April 26, 1902, which was about a year and a quarter before the bill was filed, they tendered to complainants \$2,530.08 in United States legal tender money, and the complainants refused to accept the tender, and that they have ever since been ready and willing to pay said sum. Effie M. and Henry M. Parker filed a formal answer, and the cause was referred to a master for proofs and a report of the same with his findings, and he reported that the loan was usurious; that because of said usury there was but \$2,530.08 due under said bond on April 26, 1902; that defendant made a legal tender on that date to complainants of that sum, which tender was refused, and that said tender had been kept good by the defendants ever since; that the equities of the cause were with the defendants, etc. The court sustained exceptions to this report, and entered a decree in favor of the complainants for \$6,923.50, and the sum of \$50 for solicitor's fees. This is an appeal by Ella M. and Frank M. Savage from that decree.

The association had no by-law which authorized it to dispense with competitive bidding in making its loans. The bond given by Henry G. Savage called the interest seven per cent. per annum, but it bound him to pay \$50 per month upon the shares of stock referred

to, and to pay as interest on said principal sum of \$10,000, the sum of \$58.33 1-3 per month until the principal sum was fully paid or each share of stock assigned should have attained the value of \$100. Under the conditions of the bond, the interest paid at the close of the first month would be at the rate of seven per cent. per annum. But there being also then paid \$50 upon the principal, the payment of \$58.33 1-3 at the end of the second month would be at a higher rate of interest than seven per cent. upon the principal remaining unpaid, and the rate of interest would continually increase until the loan was finally paid. We regard it as settled by *Borrowers Building Association v. Eklund*, 190 Ill. 257, and *Jamieson v. Jurgens*, 195 Ill. 86, that such a transaction is not protected by the statute relating to building and loan associations, unless the money was let at a competitive bidding as by that law required.

The main question is whether the money was let at a competitive bidding. We will first consider the record kept by the association. It shows a regular monthly meeting of the board of directors of the association, convened at the time fixed by the by-laws, and that more than a quorum of directors was present; that after the monthly financial statement had been read and the semi-annual statement had been presented, "Money was offered for sale;" that Ethel C. Meers bid a premium of ten per cent. for a loan of \$500 on certain shares of stock and on real estate security; that Thomas J. Currey bid a premium of twenty per cent. for a loan of \$1,500 on certain shares of stock and on real estate security; that Thomas Craven applied for a loan of \$2,200; C. A. Wightman for a loan of \$1,500, and Henry G. Savage for a loan of \$10,000, each offering shares of stock and real estate security, but not bidding a premium; that these five applications were referred to committees; that three other parties applied for loans for certain specified sums on

their notes and assignments of shares of stock as security; that the committees in the cases of Craven, Wightman and Meers made favorable reports and the loans to them were authorized, subject to the opinion of the attorney on the title; that the applications of Currey and Savage were approved subject to the unanimous approval of the security committee and the opinion of the attorney on the title; and that the three applications for loans on notes and shares only were approved and authorized. In other words, the association had money enough on hand to be loaned so that it accepted all the offers that were made. It is obvious that this makes a good case on paper that this money was offered for sale in an open meeting, and that bids or applications therefor were made and that all bids and applications for money were accepted. It is held in *Home Building & Loan Association v. McKay*, 217 Ill. 551, that what the statute requires is that an opportunity shall be given for competitive bidding, and that the priority or preference of a loan shall be awarded to the highest bidder, and that it is not essential that there shall be several persons bidding against each other, and that if but one bidder for a loan appears before the board at a stated meeting, his bid above the statutory rate may be accepted, and the contract will not be usurious. In other words, the statute only requires that an opportunity for competitive bidding be afforded at an open and stated meeting of the board at which all may attend, and that if there is competitive bidding the highest bidder shall receive the loan. The statute does not mean that if those who are present and asking for loans do not bid against each other, but only offer the same interest or premium and the association has for loan as much money as they all require, that the board is powerless to accept the offers.

The only oral testimony as to what occurred at that meeting was that of the secretary, who testified more

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than eight years later. He said that at that meeting the money was offered for sale, but that none of the applicants were personally present, and that bidders were not usually present in person; that the applications were in writing; that they could not know whether there would be competitive bidding; that if they had received applications at a higher premium, the directors would have accepted them; that if a man wanted money very bad he bid a premium for it, but that the rates of interest on good loans were so low at that time that they could not get premiums and most of their loans were made without premiums. The only material difference between this and the McKay case, *supra*, is that here the applicant was not present in person. Savage's application was a bid or offer to pay the rate named therein for the loan. It was just as truly a bid as if he had been present. As he did not attend in person, he would have lost the loan by his absence if any one had offered more. His failure to be present indicated that he did not intend to bid any higher, if he was overbid. If the association had given him a preference for the bid over other bidders, it would have been a departure from a competitive bidding, but the society had money enough to supply them all. The order in which the committees reported and the board voted is unimportant, where there was money enough for all. It is obvious that those who wanted to borrow money either knew that there was as much money to be loaned as would be applied for, or else they did not intend to increase their offers if some one else bid higher, for otherwise it must be presumed they would have been present in person in order to increase their bids if it became necessary. It is no doubt true that under this course of procedure abuses could be covered up. But it is also true that if the money is offered for sale at an open stated meeting of the board, and if the association has money enough to loan to supply every one who bids or ap-

plies for money, and it does loan to each bidder all he asks at the rate he offers, the association has done all it can do, unless it refuses to loan its money or demands the personal presence of the bidders in order to see if it cannot excite a competition between them which would not exist if they knew there was enough to supply every bidder. We conclude that the absence of the bidders does not put the association in the position of having made usurious loans, but that the proofs put this case within the spirit of the McKay case.

It is therefore unnecessary to consider the effect of the subsequent attempt of the association to reduce the rate of interest on its loans. We find no reversible error in the record. The decree is, therefore, affirmed.

Affirmed.

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